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International Trial Observers

DAVID WEISSBRODT*

Since the Dreyfus trial in 1899, governments have sent observers to foreign political trials both to increase their understanding of the affairs of other nations and to express concern about the fairness of the proceedings themselves. It is now common for a number of governments, including those of Canada, the Federal Republic of Germany, Japan, Sweden, the United Kingdom, and the United States, to send official observers to foreign trials of political or human rights significance.

This practice is not limited to governments. Nongovernmental organizations, including Amnesty International, the International Association of Democratic Lawyers, the International Commission of Jurists, the International Federation of Human Rights, and the International League for Human Rights have also, in the past two decades, sent observers to significant political trials in all parts of the world.

The use of trial observers has become so widespread and accepted that their status approaches that of a customary institution in international law. Yet this considerable governmental and nongovernmental activity has received little scholarly attention. In order to guide governments, nongovernmental organizations, and those who actually serve as observers, this study considers the legal principles which might apply to the work of observers, discusses the practical

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* Professor of Law, University of Minnesota. The author wishes to thank several present and former law students who assisted with the preparation of this study: Jean Boler, Andy Desmond, Jacqueline Julien, David Kramer, Anne Larson, Kevin Roche, and Michelle Timmons. Nanci Smith did outstanding secretarial work on the study. The author is also very grateful for the assistance and cooperation of Amnesty International, the International Association of Democratic Lawyers, the International Commission of Jurists, the International Confederation of Free Trade Unions, the International Federation of Human Rights, the International League for Human Rights, the Lutheran World Federation, the U.S. Department of State, several other organizations which sponsor international trial observers, Professor Ron Christenson of Gustavus Adolphus College, and many former observers who consented to be interviewed. The interpretations of facts and views expressed herein are solely those of the author and not of these organizations or individuals. The text has been reviewed by several contributing organizations, including the State Department, and does not contain classified or otherwise confidential material.

problems of selecting trials and observers, reviews the experience of some observers, and suggests approaches which might improve the effectiveness of future observers.

I. HISTORICAL BACKGROUND

A. *Monitoring the Trials of Citizens Abroad*

Governments often send embassy officials to observe foreign trials that involve their nationals. These observers are sent principally to protect the national from discrimination and to inform the embassy of the proceedings in the event of inquiries from the home country. The 1963 Vienna Convention requires host countries to permit prompt and reasonable consular access to arrested persons,¹ and access has been interpreted to include attendance at trials.² But observing trials for the protection of nationals well predates the Vienna Convention.³ For example, the Italian consul to the United States attended the 1921 trial of Sacco and Vanzetti, who were Italian citizens residing in the United States.⁴

Military officials also commonly send observers to trials of their personnel charged with criminal offenses abroad.⁵ The N.A.T.O. Status of Forces Agreement explicitly permits the governments of accused military personnel to send such observers.⁶ These observers help to assure a fair trial, monitor the efforts of the local defense attorney (usually retained by the military), and provide information so that the government can respond to questions from family and friends at home.⁷ According to the Status of Forces Agreement, when an observer believes that a soldier has been unfairly treated, that concern is to be expressed through diplomatic channels.⁸ In practice,

¹ Vienna Convention on Consular Relations, April 23, 1963, art. 36, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

² See U.S. DEPARTMENT OF STATE, PROTECTION OF AMERICAN NATIONALS ARRESTED, ON TRIAL, IMPRISONED 11 (1976) [hereinafter cited as AMERICANS ARRESTED].

³ See E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 408-09 & n.4 (1915).

⁴ R. MONTGOMERY, SACCO-VANZETTI: THE MURDER AND THE MYTH 9-10 (1964); F. RUSSELL, TRAGEDY IN DEDHAM 139 (1971).

⁵ See generally Williams, *An American's Trial in a Foreign Court; The Role of the Military's Trial Observer*, 34 MIL. L. REV. 1 (1966) [hereinafter cited as Williams].

⁶ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846; see Sciacca, *Executive Discretion to Enforce the Fair Trial Guarantees of the NATO Status of Forces Agreement*, 6 N.Y.U.J. INT'L L. & POL. 343, 345 (1973) [hereinafter cited as Sciacca].

⁷ See Brown, *Function of the Trial Observer Under the NATO Status of Forces and Other International Agreements*, JAG J., Mar. 1957, at 9; Williams, *supra* note 5; Sciacca, *supra* note 6, at 345-46; U.S. Dep't of Army Pamphlet No. 360-544, *You and the Law Overseas* 14 (undated).

⁸ See Department of Defense Directive No. 5525.1, *Status of Forces Policies and Information*

however, this information is likely to be communicated more informally to the trial participants.⁹

B. *Observing Trials of Foreign Persons*

Similar to the governmental custom of observing trials of citizens abroad is the developing practice of sending observers to trials of political or human rights interest. The trial of Captain Dreyfus was very likely the first to be attended by a legal observer sent by a foreign government.¹⁰ Despite the fact that the trial involved a French national in a French court, Queen Victoria sent her Lord Chief Justice to observe in response to widespread public concern about the fairness of the proceedings.¹¹ Lord Russell noted in his report to the Queen that the telephone and telegraph had made it impossible to treat political trials as purely domestic concerns when they called

(Jan. 20, 1966), which implements the fair trial guarantees for U.S. service personnel under the NATO Status of Forces Agreement (SOFA). Where it appears likely that an accused American soldier will not obtain a fair trial, the accused's commanding officer must request a release of criminal jurisdiction from the foreign authorities. If this request is denied, diplomatic channels are invoked to obtain an agreement that the foreign authorities refrain from exercising jurisdiction over the defendant. *Id.* at 4-5. Where a waiver of jurisdiction cannot be obtained, the provisions of NATO SOFA Article VII, ¶ 9(g) (which specifically guarantees the right to have a representative of the accused's government present at trial) are invoked and an observer is selected to attend the trial of the accused. Fuller details regarding the role of the military trial observer in assuring fair treatment of the accused may be found in the regulations of the joint services setting out the procedures for implementing Department of Defense Directive 5525.1, *id.*; see Army Regulation No. 27-50/ Secnav Instruction 5820.4E/ Air Force Regulation No. 110-12, at 1-4 (Dec. 1, 1978); USAREUR Regulation No. 550-50/ CINCUSNAVEUR Instruction No. 5820.8F/ USAF Regulation No. 110-1, at 11-13 (Aug. 20, 1968). See also *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972), criticized in Sciacca, *supra* note 6, for failure to understand that trial observers are an ineffective safeguard; L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 86-87 (1973).

⁹ Interview with Max Johnson, U.S. Army civilian legal advisor, in Mons, Belgium (Mar. 16, 1979).

¹⁰ An even earlier example of diplomatic observers — not necessarily lawyers — may have occurred at the 1858 trial of Felice Orsini who was accused of having attempted to assassinate Emperor Napoleon III. The *London Times* reports that "nearly every member of the diplomatic corps" attended the trial. *The Attempt to Assassinate the Emperor of the French*, *London Times*, Feb. 27, 1858, at 9, col. 1. In 1653 it appears that the Venetian Secretary in England attended the trial of John Lilburne and reported the proceedings to the Venetian Ambassador in France. 29 Calendar of State Papers and Manuscripts, Relating to English Affairs . . . 1653-1654 at 119, 122 (A. Hinds ed. 1929); see D. GREGG, FREEBORN JOHN 322 (1961). Still earlier, the Pope sent two diplomatic commissioners to the independent State of Florence in 1498 to observe the heresy trial of the Florentine monk, Girolamo Savonarola. P. VAN PAASSEN, CROWN OF FIRE 300 (1960).

¹¹ Lord Russell, *Paper [Concerning the Trial of Dreyfus]* (Sept. 16, 1899), reprinted in R. O'BRIEN, THE LIFE OF LORD RUSSELL OF KILLOWEN 314 (1900) [hereinafter cited as Dreyfus trial report]. The second trial of Dreyfus in 1899 was also observed by a British barrister, Thomas Terrell, Q.C. See *Decision Allegedly Reached*, N.Y. Times, Aug. 20, 1899, at 1, col. 7.

into question the very foundations of justice.¹² Dreyfus was ultimately pardoned largely as a result of the tremendous storm of domestic and international criticism that fell upon the French government.¹³

While many political trials are attended by foreign press representatives, reporters often serve only to inform the public of the more spectacular aspects of the trial. In contrast, foreign diplomats and legal observers bring special expertise and prestige to bear upon the proceedings.¹⁴ They ordinarily understand the proceedings more fully than overseas correspondents, and constitute a more reliable source of information for governments, if not also for the public. Additionally, such observers may use their prestige to influence the fairness of proceedings more directly than the media.

During the mid-1930s progressive nongovernmental American and British organizations sent distinguished private observers to trials in Nazi Germany out of concern for the treatment of fellow socialists and unionists.¹⁵ After the 1933 Reichstag fire, the World Committee for the Relief of the Victims of German Fascism was formed in London to investigate the Nazi arson charges against Georgi Dimitov and other Communists. At the trial the Committee was represented by American attorney Arthur Garfield Hays.¹⁶ Other foreign attorneys observing the trial included Californian Leo Gallagher and British attorney Douglas Benabue.¹⁷ Also in 1933, government observers appeared at the trial of several British engineers working in the Soviet Union who were accused of espionage, bribery, and "wrecking." Their trial was attended not only by British embassy officials, but also by many members of the diplomatic corps from other countries.¹⁸

¹² Dreyfus trial report, *supra* note 11, at 316.

¹³ G. CHAPMAN, *THE DREYFUS CASE* 285-304 (1955). After the Dreyfus case, an American lawyer, Mr. W.F. Doyle, observed the 1916 trial of Sir Roger Casement in London, but it is not clear whether the observer was present of his own accord. *See Casement Found Guilty*, *London Times*, June 30, 1916, at 6, cols. 1-4. Similarly, a British solicitor, John Lawrence, attended a treason trial of 126 people in Memel, Lithuania. *British Lawyers at Memel Trial*, *London Times*, Jan. 7, 1934, at 11, col. 5.

¹⁴ Distinguished foreign lawyers can also obtain audiences with the critical officials, who may refuse to see the press. *See, e.g.*, N. Albala, J. Lagadec & P. Mertens, *Iran: Rapport de mission*, 6-14 décembre 1978, at 10 (undated) (unpublished report to the International Association of Democratic Lawyers) [hereinafter cited as *Iran — Albala et al.* AIJD (Dec. 1978)].

¹⁵ Interview with Elwyn Jones, Lord Chancellor of England, in London (Sept. 19, 1978).

¹⁶ *Reich Opens Trial of Fire Suspects*, *N.Y. Times*, Sept. 22, 1933, at 1, col. 2; *Reichstag Fire*, *Times of London*, Sept. 21, 1933, at 12, col. 4.

¹⁷ *Torgler Affirms Innocence in Fire*, *N.Y. Times*, Sept. 26, 1933, at 1, col. 2; M. LUBBE, *THE REICHSTAG FIRE TRIAL* 266, 267 (1934).

¹⁸ *Soviet Indictment Read to 5 Britons*, *N.Y. Times*, Apr. 10, 1933, at 7, col. 3; *Briton Confesses He Is Spy in Soviet*, *N.Y. Times*, Apr. 13, 1933, at 9, col. 4.

The modern practice of sending and receiving nongovernmental trial observers began in earnest after World War II with the advent of such organizations as the International Association of Democratic Lawyers and the International Commission of Jurists. The International Association of Democratic Lawyers sent an observer to a 1949 Smith Act trial in the United States¹⁹ and to an important political trial in Spain.²⁰ Several international observers were invited by the Polish government to attend the Poznan trials in 1956.²¹ The International Commission of Jurists began attending South African trials that same year.²² Amnesty International (AI) was formed in 1961 and sent its first observer to a French trial in 1962.²³

The practice of sending and receiving nongovernmental observers substantially increased in the 1960s and 1970s. Since 1949 at least 64 nations have received international nongovernmental trial observers,²⁴ and 331 separate trials or appellate proceedings have been observed by over a dozen organizations.²⁵ Of these, Amnesty International has mounted 169 observer missions since its inception while the International Commission of Jurists has sent 116 since 1952 and the International Association of Democratic Lawyers has sent seventy-one.²⁶ Most observer missions have taken place in the last two decades. The International League for Human Rights, the Belgian League for Human Rights, and the International Federation of Human Rights have also sent trial observers.

Because of the limitations of diplomatic confidentiality, institu-

¹⁹ *Le procès des douze leaders Communistes aux Etats-Unis à la lumière du rapport d'un observateur de l'Association Internationale des Juristes Démocrates*, 1 *LAW IN THE SERVICE OF PEACE* 68 (1949).

²⁰ D. Forsythe, International Institute of Human Rights, Chart of Missions Concerning Political Prisoners 1952-1973, at 1 (unpublished manuscript) (1973); International Association of Democratic Lawyers, *Rappel chronologique des principales missions* (unpublished memorandum) (1973).

²¹ *Sentence Light in Poznan Trial*, N.Y. Times, Oct. 9, 1956, at 1, col. 7. The International Commission of Jurists nominated four distinguished lawyers to attend the Poznan trials, but the Polish authorities refused them entry because they might contribute to propaganda hostile to Poland. *The Poznan Trials*, 6 *BULL. INT'L COMM'N JUR.* 1 (1956). In a Cold War atmosphere the criticism of Poland was so intense that the government finally invited three very independent observers of their own choosing and thus helped to confirm the international practice of receiving trial observers.

²² See Gardiner, *The South African Treason Trial*, 1 *J. INT'L COMM'N JUR.* 43 (No. 1, 1957).

²³ AMNESTY INTERNATIONAL, *ANNUAL REPORT 1961-1962*, at 7, 10 (1962) [hereinafter cited as *AI ANNUAL REPORT* (1962)]. See also note 166 *infra*.

²⁴ D. Forsythe, *supra* note 20; AI *ANNUAL REPORT*, *supra* note 23 (1962-1980); International Commission of Jurists, *Report on the Activities of the International Commission of Jurists 1971-1977* (1977) (mimeo); International Association of Democratic Lawyers, *Rappel chronologique des principales missions 1952-1972* (1973) (unpublished memorandum); notes and reports on file in the Human Rights Library, University of Minnesota Law School.

²⁵ See sources cited at note 24 *supra*.

²⁶ *Id.*

tional memories, and widely dispersed records, it is difficult to determine how often governments have sent trial observers even in the recent past. Foreign ministries may not be informed of local embassy decisions to observe trials of particular interest. The results of these diplomatic trial observations may not be separately reported, but may be included in more general surveys of political developments. Embassy staffs may not remember trial observation experience; officers knowledgeable about such incidents have often been transferred to other posts.

However, in February 1980 the United States State Department queried its diplomatic posts abroad about whether they had sent observers to trials of political or human rights interest.²⁷ The responses indicate that attendance at trials is fairly common: Ninety-eight United States diplomatic posts reported that embassies in twenty-four countries had experimented with the use of trial observers at political or human rights cases.²⁸ Since suitable trials may not occur in all the countries from which posts responded, twenty-four positive replies show a relatively substantial number of posts with observer experience.

The United States embassies in South Africa and South Korea have the longest record of observing major trials. The embassies in those countries also send detailed reports of their observations to the State Department in Washington. United States diplomatic posts in Bolivia, Ghana, Guyana, Haiti, India, Lebanon, the Philippines, Poland, Portugal, Taiwan, Thailand, Togo, and Zaire have also successfully sent observers to political trials. American diplomats have attended only minor, nonpolitical trials in Bulgaria, Peru, and the Soviet Union.

Other governments have also sent observers to trials of political and human rights interest. For example, the Australian, British, Canadian, German, and United States embassies, together with several nongovernmental organizations, successfully sent observers to the trial of the Thammasat 18 in Thailand.²⁹ Australian, British, and Canadian embassy officials, like those of the United States, have observed South African trials. Political trials in Kenya and Mali have

²⁷ U.S. Department of State Telegram 51659 to all diplomatic posts (Feb. 26, 1980).

²⁸ There were 137 diplomatic posts which received the inquiry.

²⁹ See Simons, *Thai Youths Deny Charges in Open Trial*, Washington Post, Sept. 6, 1977, at A18, cols. 1-4; Letter from Daniel P. Sullivan, U.S. Department of State, to Peter Anderson, member of Amnesty International U.S.A. Group 37 (Aug. 30, 1978). See generally Garrett, *Human Rights in Thailand: The Case of the Thammasat 18*, 2 UNIVERSAL HUMAN RIGHTS (No. 4, 1980), at 43.

also been observed by foreign diplomats.³⁰ West German and Dutch embassy officials attended political trials during the period of the Colonels in Greece.³¹ About thirty diplomats attended the trial of former dictator Macias in Equatorial Guinea.³²

The seventy-two nations which have received diplomatic and nongovernmental trial observers include Angola, Bangladesh, Benin, Bolivia, Brazil, Bulgaria, Burundi, Cambodia, Cameroon, Canada, Chile, Comoro, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, Equatorial Guinea, Ethiopia, France, Federal Republic of Germany, Gambia, German Democratic Republic, Ghana, Greece, Grenada, Guyana, Haiti, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Kenya, Laos, Lesotho, Libya, Madagascar, Malawi, Mali, Mexico, Morocco, Namibia, Nicaragua, Pakistan, Peru, Philippines, Poland, Portugal, Rhodesia (Zimbabwe), St. Kitts, Senegal, Sierra Leone, South Africa, South Korea, Spain, Sri Lanka, Switzerland, Tanzania, Taiwan, Thailand, Togo, Tunisia, Turkey, the United Kingdom, the United States, Yugoslavia, and Zaire.³³

The United Nations has also been involved in trial observation, although to a lesser extent than governments or nongovernmental organizations. For example, the U.N. High Commissioner for Refugees has sent employees to Thailand to observe trials of pirates who prey upon Vietnamese refugee boats, thereby expressing the interest of the U.N.H.C.R. in those proceedings. The U.N.H.C.R. also regularly arranges for defense counsel and sometimes sends local counsel to observe trials of refugees throughout the world.

The United Nations was also asked to send an observer to the Macias trial, but declined out of fear that the death penalty would be imposed. More recently the U.N. was asked to send an observer to a trial in Nicaragua, but the trial ended after only one day — before

³⁰ The U.S. embassies in Kenya and Mali indicated that foreign diplomats have attended political trials in those countries, but the embassies did not clearly state whether the U.S. embassies sent representatives to the trials.

³¹ M. Ellman, Report on Trial at Athens 3rd to 8th July, 1968, at 3 (Jul. 20, 1968) (unpublished report to the International Commission of Jurists) [hereinafter cited as Greece — Ellman/ICJ (1968)]. The Israeli government invited foreign diplomatic observers to the trial of Adolph Eichmann; the U.S. and British refused to attend, but other diplomats observed the proceedings. *Trial of Eichmann Opens Before Israeli Tribunal*, N.Y. Times, Apr. 11, 1961, at 1, col. 6 & 14, col. 2.

³² See A. ARTUCIO, THE TRIAL OF MACIAS IN EQUATORIAL GUINEA 22 (International Commission of Jurists, 1979) [hereinafter cited as EQUATORIAL GUINEA — TRIAL OF MACIAS (1979)].

³³ See notes 19 & 27 *supra*.

the U.N. Human Rights Division could decide on the propriety of sending an observer.

There seems to be no reason why the U.N. could not accept an invitation by a host country so long as the observer remained free to form an independent judgment of the proceedings and the U.N. was able to choose the invitations for which observation would be useful.³⁴ The criteria for deciding which trials merit sending a U.N. observer should be quite similar to the factors weighed by governments and nongovernmental organizations as discussed below. A U.N. observer would, of course, have a more impressive and independent presence at any trial, simply because of the organization's prestige.

Furthermore, as part of the settlement which resolved the March 19, 1981, occupations of the Dominican Republic's embassy in Colombia, the Inter-American Commission on Human Rights of the Organization of American States agreed to observe several political trials in Colombia. Since that time members of the Commission and their local representatives have observed various stages of these proceedings.³⁵

³⁴ In determining whether to send an observer, it has been suggested that the U.N. consider such factors as (1) whether the government had invited an observer, so as to avoid infringing on the domestic jurisdiction of the state, (2) whether the U.N. can be reasonably certain that adequate procedures will be observed, (3) whether the U.N. observer might be used to legitimize an unfair proceeding or show trial, (4) whether attendance at the trial will assist the defendant, and (5) whether the U.N. has a particular interest in the case, for example, if witnesses to an earlier U.N. fact-finding mission had been selected for persecution. While these considerations seem, in general, sensible, they may not adequately cover all future contingencies. Hence, these five factors should not be rigidly applied as prerequisites to a U.N. trial observer mission, but merely thought of as considerations. Also, it is difficult to understand the basis for the second factor indicated above. If the trial is expected to be fair, there is less reason to send an observer. Indeed, one of the ordinary objectives of sending an observer is to encourage fairness at a trial and to report upon unfairness.

One commentator has proposed that trial observers be made an integral part of the Inter-American Commission on Human Rights. Terry, *Third-Party Trial Observers: A Proposal for Codification and Implementation of International Procedural Due Process in the Americas*, 4 AKRON L. REV. 202, 215-19 (1971). There are so many trials in the various countries of the Western Hemisphere that such a concept appears impractical as proposed, but the Commission might be given the discretion as to which trials deserve observation.

³⁵ Organization of American States, Report on the Situation of Human Rights in the Republic of Colombia, OAS Doc. OEA/Ser. L/V/II. 53, doc. 22, at 9-14, 143-44, 180-81 (1981). In order to assist the negotiation for the release of the embassy hostages in Colombia, the U.S. Department of State sent a telegram to the U.S. Embassy in Bogotá urging the Colombian Government to accept international observers and summarizing the international practice of receiving observers:

Over the past 20 years, private international human rights and legal organizations have developed and utilized the practice of sending observers to trials in different countries. The trials in question have involved issues of human rights or have had important human rights implications.

From 1952 to 1978, more than 50 countries have allowed in trial observers. In fact, it would appear that it has become a widespread international practice that

While over seventy nations have received diplomatic and non-governmental observers, some nations have been less cooperative. Diplomats have been refused entry to political trials in Czechoslovakia upon being informed that no more room remained in the courtroom.³⁶ Similarly, in the Soviet Union, diplomats attempting to

observers are received at trials. The practice has been based on Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights which provide for fair and public hearings. In the Americas, countries which have allowed in trial observers comprise the U.S., Canada, the Dominican Republic, Brazil, Ecuador, Mexico, Guyana, Nicaragua, Cuba, Paraguay and Chile.

Organizations which have highly developed the practice of sending trial observers and have considerable experience and expertise in so doing are Amnesty International and the International Commission of Jurists. The I.C.J. based in Geneva is an eminent organization of jurists with consultative status at the U.N. and Council of Europe and with observer status at the O.A.S. Other organizations which utilize this practice effectively include the International League for Human Rights (a N.Y.-based NGO [nongovernmental observer] with consultative status at the U.N.), and the International Federation for Human Rights (a Paris-based NGO with consultative status at the U.N.).

Observers sent by organizations to attend trials are jurists, in many cases eminent ones, selected for their impartiality and independence.

In most, if not all, cases, governments are notified by the organizations that an observer will be attending the trial. Permission is not requested, and the practice has been that governments have generally accepted the observers (with the exception of some East European countries).

The objectives of the trial observer are as follows: to attend and observe the trial — sometimes their mere presence assures greater fairness and represents reassurance to the defendant; and to evaluate the fairness of the trial in terms of applicable national and international standards of law and due process. Observers evaluate the openness of the trial, the fairness of the proceedings, the demeanor of the participants (judge, prosecutor), and whether any international norms have been violated, for example, mistreatment or torture of defendants, forced confessions, whether adequate defense has been provided and received; and report their findings to the organization which has sent them. The organization then decides whether to make the observer's report public.

Observers generally attend all phases of a trial unless its length is prohibitive or the trial is extended over long periods of time. In many instances, observers are afforded more privileges than the public. For example, they have been allowed into closed trials and into closed military proceedings. They have been given preferential seating arrangements. This has been done to enhance their prestige, to ensure that they hear well, and to prevent any appearance of their sitting either with the defense or the prosecution. Observers generally make an effort to meet with the defense attorneys, the prosecution and the judge in order to discuss the proceedings. They also seek to see the defendants privately and in many cases, have been permitted to do so.

Governments generally do not restrict and regulate what observers can see or consider. It would be considered unacceptable for restrictions to be so imposed. Since the organizations which send the observers are private, independent non-governmental groups, and the observers selected for their impartiality and a great deal of freedom in the carrying out of their mission.

U.S. Dept. of State, unclassified telegram 086082 to U.S. Embassy in Bogotá (April 4, 1980).

³⁶ Even in being refused admission to the courtroom, but in remaining publicly visible, observers may make an effective statement of international concern about a political trial. At

observe supposedly public trials have been told that the courtroom was not yet open, and then suddenly informed that there were no seats available.³⁷ Last-minute United States embassy requests to observe trials in China and Romania have been refused by the governments in those countries, and the Somali government has also refused an American trial observer.³⁸ But despite these exceptions, the common practice of receiving trial observers over the past twenty-five years suggests that there is international recognition of foreign trial observers. Through time and usage, this recognition has arguably become an international legal norm, one which compels even reluctant nations to receive observers at trials of human rights concern.³⁹

the Ginzburg and Scharansky trials the Soviet government gave frequent public briefings. Families of the defendants were permitted to take notes during the trials without hindrance. Both Scharansky and Ginzburg were permitted to make closing statements without interruption. The Soviet government even issued a press release purporting to summarize Scharansky's closing statement; the summary was not objective but it was far more complete than could have otherwise been expected. The presence of the diplomatic observers and the media did not prevent other violations of the defendants' rights. For example, the defendants were not permitted to submit exculpatory documents into the record. Nevertheless, even the attempt to observe these political trials obviously had an impact.

³⁷ Letter from Frances Elliott, British Foreign and Commonwealth Office, to David Weissbrodt (Apr. 23, 1979) [hereinafter cited as British Foreign Office Letter].

³⁸ The earliest instance in which U.S. diplomats attempted to observe a political trial may have occurred when the U.S. government unsuccessfully requested an opportunity to attend the trial of Cardinal Mindszenty in Hungary. See 5 FOREIGN RELATIONS OF THE UNITED STATES 463 (1949). In some respects U.S. interests were directly at stake in that case, because the U.S. minister in Hungary was implicated in the accusation against the Cardinal.

³⁹ See generally J. BRIERLY, LAW OF NATIONS 59-62 (6th ed. 1963); A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); C. DEVISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 148-56 (Corbett trans. 1957); C. PARRY, THE SOURCES OF EVIDENCES OF INTERNATIONAL LAW 56-82 (1965); H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 46-60 (1972); K. WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (1964); Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75); Briggs, *The Colombian-Peruvian Asylum Case and Proof of Customary International Law*, 45 AM. J. INT'L L. 728 (1951); Jessup, *Non-Universal International Law*, 12 COLUM. J. INT'L L. 415 (1973); Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y.B. INT'L L. 127 (1937); Kunz, *Nature of Customary International Law*, 47 AM. J. INT'L L. 662 (1953); MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115 (1957); Schacter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300 (1968); Silving, *'Customary Law': Continuity in Municipal and International Law*, 31 IOWA L. REV. 614 (1946); Tunkin, *Remarks on the Judicial Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419 (1961); Virally, *The Sources of International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 116, 128-43 (M. Sorensen ed. 1968); Waldock, *General Course in Public International Law: The "Common Law" of the International Community — International Custom*, 106 RECUEIL DES COURS 39 (1962); Wright, *Custom as a Basis for International Law in the Post-War World*, 2 TEX. INT'L L.J. 147 (1966).

II. THE LEGAL BASIS FOR INTERNATIONAL TRIAL OBSERVERS

A. Customary International Law

There are two criteria for ascertaining whether a custom, such as the practice of receiving trial observers, has attained the status of a rule of customary international law.⁴⁰ First, the custom must comprise a general practice among nations.⁴¹ Second, the custom must be accepted as giving rise to a legal obligation.⁴² The first criterion, general practice among nations, is usually measured by the duration, repetition, continuity, generality, and uniformity of custom.⁴³

Duration is measured according to the nature of the custom.⁴⁴ The required duration should probably depend upon the duration of the existence of conditions which permit or give rise to the custom.⁴⁵ In the case of foreign trial observers, deficiencies in international transportation and communication hindered the practice and delayed its full onset prior to the Dreyfus case.⁴⁶ The advent of telecommunications and increasingly rapid travel has made it possible to learn of important upcoming trials and to dispatch observers swiftly. Since the practice of receiving foreign trial observers has grown as quickly as technology has permitted, it should be judged to have met the duration standard.

Equal in importance and related to the question of duration⁴⁷ is the recurrence of the practice over time.⁴⁸ Repetition of a practice among nations is central to the concept of international customary

⁴⁰ Kopelmanas, *supra* note 39, at 129; Kunz, *supra* note 39 at 665; Waldock, *supra* note 39, at 42.

⁴¹ See K. WOLFKE, *supra* note 39, at 65; Akehurst, *supra* note 39, at 1.

⁴² Also referred to as "opinio juris." See North Sea Continental Shelf Cases, [1969] I.C.J. 4, 29-30, 45-46 [hereinafter North Sea Cases]; A. D'AMATO, *supra* note 39, at 66; C. DEVISSCHER, *supra* note 39, at 150; C. PARRY, *supra* note 39, at 61; H. THIRLWAY, *supra* note 39, at 47; K. WOLFKE, *supra* note 39, at 70; Akehurst, *supra* note 39, at 31; Kunz, *supra* note 39, at 667; MacGibbon, *supra* note 39, at 125; Schacter, *supra* note 39, at 311; Tunkin, *supra* note 39, at 422; Virally, *supra* note 39, at 133; Waldock, *supra* note 39, at 45.

⁴³ A. D'AMATO, *supra* note 39, at 56-66; Waldock, *supra* note 39, at 43-45. Cf. Akehurst, *supra* note 39, at 12-27 (qualifies proposition by explaining that the amount of practice necessary to establish a customary rule is much greater in some instances than in others).

⁴⁴ A. D'AMATO, *supra* note 39, at 56-59; K. WOLFKE, *supra* note 39, at 67-68; Akehurst, *supra* note 39, at 15-16; Silving, *supra* note 39, at 625.

⁴⁵ Silving, *supra* note 39, at 625. Cf. North Sea Cases, *supra* note 42, at 44 (given the swiftness of modern communications, passage of short period of time not a bar to formation of rule of customary international law if other factors of consistency, uniformity, and repetition are present).

⁴⁶ See text accompanying note 10 *supra*.

⁴⁷ North Sea Cases, *supra* note 42, at 44.

⁴⁸ A. D'AMATO, *supra* note 39, at 59.

law.⁴⁹ A practice or custom is most likely to have ripened into a rule of law if it is regularly observed by those states which it affects. In the case of foreign trial observers, considerable repetition has taken place over the past twenty-five years. The acceptance of more than 400 observers⁵⁰ attests to the frequency of the practice. Since many jurists suggest that only a few occurrences of a given practice will suffice to meet this test,⁵¹ the sending and acceptance of observers most likely qualifies.

In addition, to be accepted as a rule of customary law, a practice ought to be continuous over time and not lapse into periods of disuse.⁵² While trial observers may not have been sent and received on any regular basis between the World Wars,⁵³ the practice has been continuous since the mid-1950s. Since a recent trend toward continuity is probably of greater importance than continuity during the early years of the practice,⁵⁴ this requirement is arguably met.

Another factor to consider is the degree to which a practice has been observed by states which are geographically, economically, and ideologically diverse.⁵⁵ A consistent practice within a group of homogeneous countries (for example, those of Western Europe), while a regional custom,⁵⁶ would not suffice to create a binding international norm.⁵⁷ Trial observers, however, have been accepted in countries on five continents,⁵⁸ in both industrialized Western states and developing Third World nations,⁵⁹ and in countries with market as well as socialist economies.⁶⁰ Therefore, this consideration has been most likely met.

The final consideration in determining whether trial observation has entered into customary international law is uniformity of acceptance among nations. A practice need not be unanimously accepted to be uniform;⁶¹ the number of states needed to create a rule of cus-

⁴⁹ Tunkin, *supra* note 39, at 419; Waldock, *supra* note 39, at 44.

⁵⁰ See note 24 *supra*.

⁵¹ E.g., K. WOLFKE, *supra* note 39, at 68.

⁵² Kunz, *supra* note 39, at 666.

⁵³ See generally note 24 *supra*.

⁵⁴ A. D'AMATO, *supra* note 39, at 60; Akehurst, *supra* note 39, at 20-21.

⁵⁵ See, e.g., North Sea Cases, *supra* note 42, at 43; Tunkin, *supra* note 35, at 427-28.

⁵⁶ See, e.g., Asylum Case, [1950] I.C.J. 266, 276-77; Case Concerning Right of Passage Over Indian Territory, [1960] I.C.J. 6, 38.

⁵⁷ Waldock, *supra* note 39, at 44.

⁵⁸ The exceptions are Antarctica and Australia.

⁵⁹ Western industrial states which have received foreign trial observers include the United States, the United Kingdom, and West Germany. Included among Third World nations receiving trial observers are Cameroon, Guyana, and India. See note 24 *supra*.

⁶⁰ For example, Canada, France, Tanzania, and Yugoslavia. See note 24 *supra*.

⁶¹ Kunz, *supra* note 39, at 666; Waldock, *supra* note 39, at 44.

tomary international law varies according to the scope of the rule's applicability among nations.⁶² Here, the relevant inquiry is how many states actually hold political trials to which observers might be sent and how many of those states refuse to permit the practice.⁶³ Of the many states which hold political trials, only a few have attempted to avoid receiving foreign trial observers. Czechoslovakia, for example, expelled observers in 1967 and 1979. In 1976 and 1977, it permitted an observer to remain in a courthouse while refusing him entry to the courtroom itself supposedly because of insufficient room. In 1970, 1971, and 1978, Czech officials adjourned trials entirely rather than face international scrutiny in reports of trial observers.⁶⁴

There are other examples of refusing foreign trial observers. Greece accepted international observers to twenty-seven trials from 1959 to 1974, but refused an I.C.J. observer for the Mangakis trial in 1970.⁶⁵ Iran accepted a dozen observers from 1965 to 1978,⁶⁶ but in 1970 barred an observer from a trial and deported him from the country; his Iranian interpreter was arrested and sentenced to ten years in prison.⁶⁷ Other nations that have barred observers by various means at one time or another include Bulgaria,⁶⁸ Chile,⁶⁹ Colombia,⁷⁰ the Dominican Republic under Trujillo (visa refused),⁷¹ Egypt (visa delayed),⁷² Nicaragua (trial delayed after one day of observa-

⁶² Waldock, *supra* note 39, at 44.

⁶³ See Akehurst, *supra* note 39, at 20, and I.C.J. opinions cited therein.

⁶⁴ See note 24 *supra*.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ AI ANNUAL REPORT, 1971-1972, at 49 (1972); AI ANNUAL REPORT, 1970-1971, at 68-69 (1971) [hereinafter cited as Iran — Heldman/AI (1970)]. The Iranian government was also so irked by a particularly critical report in 1972 that it refused "official" observers for six years until 1978, but did sparingly permit foreign observers in their "private" capacity. See Iran — Albala *et al.*/AIJD (1978), *supra* note 14; M. Zavrian, Rapport sur une mission à Téhéran du 12 au 18 septembre 1973 (Sept. 23, 1973) (unpublished report to the Fédération Internationale des Droits de l'Homme) [hereinafter cited as Iran — Zavrian/FIDH (1973)]; N. Albala, Report on Mission to Iran, January/February 1972 (Feb. 14, 1972) (unpublished report to Amnesty International) [hereinafter cited as Iran — Albala/AI (1972)].

⁶⁸ W. Sporn, Report on the Case of Dr. Henry Spetter (Aug. 14, 1974) (unpublished report to Amnesty International) [hereinafter cited as Bulgaria — Spetter/AI (1974)].

⁶⁹ *13 Go on Trial in Chile; 2 U.S. Lawyers Barred*, N.Y. Times, April 23, 1975, at 14, col. 4. The two lawyers were from the Center for Constitutional Rights in New York; international organizations have been more successful in sending observers to trials in Chile.

⁷⁰ Soon after Amnesty International issued a very critical report on Colombia, it attempted to send a trial observer, but the Colombian government refused. See AI, AMNESTY INTERNATIONAL REPORT 122-25 (1980).

⁷¹ International Commission of Jurists, Press Release (Nov. 29, 1961) [hereinafter cited as Dominican Republic — Trujillo (1961)].

⁷² International Commission of Jurists, Press Release (Jan. 18, 1962); *The Cairo Trial of*

tion),⁷³ Poland (place and time of trial kept secret or entry to country refused),⁷⁴ a former colony of Portugal (visa refused or observer detained by secret police),⁷⁵ South Africa (trial adjourned after two and one-half days of observations),⁷⁶ Spain (on one occasion, observers refused; on another, observers were refused by local officials and then admitted),⁷⁷ Taiwan (observer barred),⁷⁸ and the U.S.S.R. (courtroom not yet open and then courtroom said to be full; visa refused to nongovernmental observer, but trials theoretically open).⁷⁹

Not all nations which have been hostile to trial observers object to them all the time. The recalcitrant states may, indeed, accept the principle of trial observers but feel that one of the exceptions discussed below is applicable in their particular instance. Also, the nations which have accepted observers far outnumber those which have refused them. The practices of some countries — for example, Czechoslovakia, Greece, and Spain — have not been consistent from year to year. Even those countries which have been responsible for most of the refusals, for example, Czechoslovakia and the U.S.S.R., do not generally deny the request of foreign observers to attend trials; they maintain a theoretical right to open trial while denying admission to observers by such ploys as saying that the courtroom is full. Since virtually all countries which hold political trials have agreed to accommodate international trial observers at one time or another and since none has explicitly denied the right to attend, the practice of receiving international observers is sufficiently uniform to be deemed a part of customary international law.

Since the practice of receiving international trial observers meets

French Diplomats, 14 BULL. INT'L COMM'N JUR. 34 (1962) (the visa was finally granted, but only on the second day of trial).

⁷³ AMNESTY INTERNATIONAL, THE REPUBLIC OF NICARAGUA: AN AMNESTY INTERNATIONAL REPORT 42 (1977) [hereinafter cited as AI NICARAGUA REPORT].

⁷⁴ Darnton, *U.N. Worker Reported in Shock Over Polish Trial as NATO Spy*, Minneapolis Tribune, Apr. 13, 1980, at 16A [hereinafter cited as Poland — Hadding/ICJ (1980)]; M. de Montfort, Report of an Amnesty International Mission to Warsaw, 4–8 June, 1977 (unpublished report to Amnesty International) [hereinafter cited as Poland — de Montfort/AI (1977)].

⁷⁵ AI ANNUAL REPORT, 1965–1966, at 9 (1966); International Commission of Jurists, Press Release (Sept. 13, 1960).

⁷⁶ See J. Archer, Report on Visit to South Africa (June 4, 1975) (unpublished report to the International Commission of Jurists) [hereinafter cited as S. Africa — Archer/ICJ (1975)].

⁷⁷ S. Suckow, Report on Observer Mission — Appeal Before the Supreme Court of Spain in the Matter of Case 1001, Madrid, February 11, 1975 (Feb. 17, 1975) (unpublished report to the International Commission of Jurists) [hereinafter cited as Spain — Suckow/ICJ (1975)].

⁷⁸ J. Seymour, Report of a Mission to Taiwan, September 1975 (undated) (unpublished report to Amnesty International) [hereinafter cited as Taiwan — Seymour/AI (1975)].

⁷⁹ See British Foreign Office Letter, *supra* note 37.

the tests of duration, repetition, continuity, generality, and uniformity, it satisfies the requirement of general acceptance among nations. It is more difficult to state with assurance that the practice satisfies the second criterion of customary international law, that of acceptance or "*opinio juris*."

In order to met the *opinio juris* requirement, the practice must be one which is accepted as law in the international community.⁸⁰ According to the weight of authority, there would have to exist mutual agreement among nations that foreign observers are entitled as of right to attend trials of human rights concern. Otherwise, the *opinio juris* requirement would not be satisfied and the practice, although persistent and widespread, would not constitute a rule of customary international law.⁸¹ A growing minority of jurists hold that frequent repetition may generate a conviction of legal duty⁸² and that *opinio juris* may be inferred or presumed upon a prima facie showing that the practice is unusually well-established and widespread.⁸³

Whatever the theoretically correct view of *opinio juris*, it is debatable whether sovereign nations feel legally constrained to admit foreign observers into their courts of law. A noncomplying state could argue that past observers have been accepted only as a matter of comity, political expedience,⁸⁴ imitation, courtesy, or protocol.⁸⁵ However, most countries have accepted observers in the past in recognition of an internationally guaranteed right to an open trial.⁸⁶

Hence, a strong argument can be made that the acceptance of international trial observers has become a rule of customary international law. The practice is well established and accepted within the international community; those nations which on occasion resist accepting trial observers have not condemned the practice itself. Even if a nation believes it is not bound by customary international law to admit foreign observers to its political trials, it may feel constrained to do so to be consistent with international practice and to demonstrate the fairness and openness of its criminal justice system.

There are several other international legal principles which sustain the right of observers to attend trials throughout the world. The first of these is the fundamental right to a fair and open trial.

⁸⁰ Statute of the International Court of Justice, art. 38(1)(b).

⁸¹ See sources cited *supra* note 45.

⁸² C. PARRY, *supra* note 39, at 62.

⁸³ North Sea Cases, *supra* note 42, at 230-32 (dissenting opinion of Judge Lachs); Waldock, *supra* note 39, at 48-49.

⁸⁴ See, e.g., Asylum Case, [1950] I.C.J. 266.

⁸⁵ Tunkin, *supra* note 39, at 420.

⁸⁶ See note 87 *infra*.

B. *The Right to a Fair and Open Trial*

The right to a public trial has been established in several international human rights instruments. The Universal Declaration of Human Rights provides in Article 10 that "[e]veryone is entitled in full equality to a fair and public hearing . . . of any criminal charge against him."⁸⁷ Article 11 adds that "[e]veryone charged with a penal offense has the right to be presumed innocent until proven guilty according to law in a public trial. . . ."⁸⁸ Both of these provisions were adopted without dissent by the United Nations General Assembly.⁸⁹

The International Covenant on Civil and Political Rights provides that:

[I]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.⁹⁰

This covenant has been ratified by over sixty nations, including some which refused foreign trial observers before the treaty came into force.

There are also regional treaties which guarantee the right to an open trial. The American Convention on Human Rights provides that criminal proceedings shall be public,⁹¹ while the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to public hearing for everyone in the "determination of his civil rights and obligations or of any criminal charge against him. . . ."⁹² There have been only a very few cases challenging a member nation of the European Convention for failing

⁸⁷ G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter cited as Universal Declaration].

⁸⁸ *Id.*

⁸⁹ The words "and public" of Article 10 were added by Mr. Perez Cisneros of Cuba and adopted by a vote of twenty-two in favor, none against, with nine abstentions. The General Assembly later unanimously passed Article 10. All of the draft texts of Article 11 contained provisions for public trial and no effort on the part of any delegates was made to delete these words. Article 11 passed the drafting body with forty-two votes in favor, none against, and two abstentions; the General Assembly later approved it without dissent. A. VERDOODT, *NAISSANCE ET SIGNIFICATION DE LA DECLARATION UNIVERSELLE DES DROITS DE L'HOMME* 125 (1964) [hereinafter cited as VERDOODT].

⁹⁰ G. A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 54, U.N. Doc. A/6316, Article 14(1), adopted Dec. 19, 1966, entered into force Mar. 23, 1976.

⁹¹ O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. O.E.A./Ser. L/V/II.23 doc. rev. 2, art. 8(5), signed Nov. 22, 1969, entered into force July 18, 1978.

⁹² 213 U.N.T.S. 222, art. 6(1), signed Nov. 4, 1950, entered into force Sept. 3, 1953 [hereinafter cited as European Convention].

to provide a public hearing.⁹³ In one case in which military disciplinary proceedings took place *in camera*, the European Court of Human Rights did find a violation of the right to public hearing guaranteed in the European Convention.⁹⁴

The right to a public trial seems to have been an unquestioned fundamental assumption for drafters of international human rights treaties either because of a long domestic history of public trials or due to domestic constitutional, statutory, and common law protections.⁹⁵ All draft texts of the Universal Declaration of Human Rights

⁹³ Very few cases may have arisen under the European Convention because the domestic law of all of the European nations subscribing to the Convention provides for public trials. See *ANNALES DE LA FACULTE DE DROIT ET DES SCIENCES POLITIQUES ET ECONOMIQUES DE STRASBOURG, LA PROTECTION INTERNATIONALE DES DROITS DE L'HOMME DANS LE CADRE EUROPEEN* 127-39 (1961). The following cases were declared inadmissible by the European Commission of Human Rights: *X against Austria*, 35 EUR. COMM. OF HUMAN RIGHTS COLLECTION OF DECISIONS 109 (Application No. 3959/69, decision of 21 July 1970) (applicant protested *in camera* proceeding of the Austrian Administrative Court, found not to be concerned with the applicant's civil rights or obligations within the competence of the Commission); *Strupport against the Federal Republic of Germany*, 27 EUR. COMM. OF HUMAN RIGHTS COLLECTION OF DECISIONS 61 (Application No. 2804/66, decision of 16 July 1968) (applicant asserted proceedings in Berlin Regional Court to determine his civil liability were not public; Commission found that the main proceedings before the Regional Court were public); [1958-1959] Y.B. EUR. CONV. ON HUMAN RIGHTS 382 (Application No. 462/59, decision of 7 July 1959) (applicant protested that certain appellate proceedings were not conducted in public; held, this did not constitute a violation of the public trial provision.); *X against Austria* [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS 212 (Application No. 1931/63, decision of 2 October 1964) (applicant was disciplined by Bar Association in a private hearing; these proceedings did not affect applicant's civil rights or obligations within the competence of the Commission).

⁹⁴ *ENGEL AND OTHERS CASE*, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 490 (Eur. Court of Human Rights). Applicants were members of the Netherlands Armed Forces and were punished on different occasions for breaches of the rules of military discipline. Each applicant appealed to the Supreme Military Court which confirmed the penalties after *in camera* proceedings. The government of the Netherlands left the admissibility of the claim of a lack of a public trial to the discretion of the European Commission on Human Rights. [1972] Y.B. EUR. CONV. ON HUMAN RIGHTS 538. The European Court on Human Rights found that the *in camera* proceedings violated Article 6, section 1 because they were not in public, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 498, but declined to give the applicants any compensation, *id.* at 500.

The European Commission has considered the question of whether a hearing must be oral, with parties present in order to satisfy the requirement of a fair and public hearing. In *X against the Federal Republic of Germany*, [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 462, 482-84, the Commission found that an appeals procedure may be conducted fully in writing, without an oral appearance, where the defendant, represented by competent legal counsel, had originally appeared and orally stated his case which was fully transcribed. *Accord, A. and B. X. Against the Federal Republic of Germany*, [1961] Y.B. EUR. CONV. ON HUMAN RIGHTS 286, 294 (the public hearing provision does not apply to an appellate tribunal when it decides whether the requirements for lodging and appeal to a higher court are met, and when it does not rule on the rights and obligations of the applicant); see J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 151 (1969).

⁹⁵ See ALBANIA CONST. art. 102; AUSTRIA CRIM. PROC. CODE ch. 18, § 228 (1975); BARBADOS CONST. art. 18(9); BELGIUM CONST. art. 96 (1831, amended 1893, 1920, 1921); BOLIVIA CONST. art. 18, para. 2, art. 19, para. 4; BRAZIL PENAL CODE art. 792 (1941); BULGARIA

contained a provision for a public trial; the International Covenant on Civil and Political Rights simply copied the provision for a public trial from the text of the European Convention.⁹⁶ Most likely the drafters of the international conventions guaranteed a public trial for the same reasons and to accomplish the same purposes that have traditionally been attributed to public trials. These purposes include fairness and protection of the defendant, accurate fact-finding, public education, and the airing of important issues.

The right to a public trial, as provided in international and regional instruments, is primarily intended to help ensure a fair trial and protect a defendant from abuse of criminal process.⁹⁷ This right belongs to the accused, as demonstrated by the language stated above. Moreover, the right to a public trial is listed in the International Covenant on Civil and Political Rights and the European Convention with other provisions protecting the rights of the defendant, such as the right to be presumed innocent⁹⁸ and the right to utilize counsel in one's own behalf,⁹⁹ indicating that the drafters of the documents viewed the right to a public trial as a right belonging to the defendant as well as one that would help ensure a fair trial.¹⁰⁰

CONST. art. 137(2); CANADA BILL OF RIGHTS 2(F); COLOMBIA PENAL CODE ch. II, art. 507 (1975); CZECHOSLOVAKIA CONST. art. 103, § 2; DOMINICAN REPUBLIC CONST. art. 8, § 2(j); ECUADOR CONST. art. 95; FRANCE PENAL PROC. CODE art. 309 (1978-79); GAMBIA CONST. art. 20(9); GREECE CONST. arts. 93(2), 96(3), 97; GUATEMALA CONST. art. 240, para. 3; GUYANA CONST. art. 144(9); HAITI CONST. art. 122; HUNGARY CONST. ch. III, § 49(1); IRAQ INTERIM CONST. art. 20(c) (1970); IRELAND CONST. art. 34, § 1 (1937, *amended* 1939, 1941); ISRAEL CONST. DOCS. IX, Court Law 38; JAMAICA CONST. ch. III, § 20(3); JAPAN CONST. art. 37; KENYA CONST. art. 77, §§ 10-11 (1963, *revised* 1965, *amended* 1967); MALTA CONST. art. 40(3), (4) (1964, *amended* 1965, 1966, 1970, 1972, 1974); MAURITIUS CONST. art. 10(9), (10); MEXICO CONST. art. 94; MONGOLIA CONST. art. 70; MOROCCO PENAL PROC. CODE art. 301 (1959); NETHERLANDS CONST. art. 175; LAW OF THE ORGANIZATION OF THE JUDICIARY, No. 62-11, art. 2 (Niger 1962); PERU CONST. art. 233(3); PHILIPPINES CONST. art. 4, § 19; POLAND CONST. art. 63.1 (1952, *amended* 1954, 1957, 1960, 1961, 1963); PORTUGAL CONST. art. 211; ROMANIA CONST. art. 110 (1965, *amended* 1968, 1971, 1974, 1975); RWANDA CONST. art. 88; SIERRA LEONE CONST. ch. II, § 13(3); S. KOREA CONST. art. 110; TRINIDAD AND TOBAGO CONST. ch. 1, § 5(2)(f)(ii); U.S.S.R. CONST. art. 157; U.S. CONST. amend. VI; URUGUAY CONST. art. 22; VIETNAM CONST. art. 133; YUGOSLAVIA CONST. art. 227; ZAMBIA CONST. art. 20, §§ 10-11.

⁹⁶ See note 90 *supra* and accompanying text.

⁹⁷ The Declaration of Human Rights and the American Convention on Human Rights speak only in terms of the criminal process. The International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms provide a public trial for both criminal and civil matters. The criminal process will therefore be the focus of the above discussion, though in most cases arguments made concerning a criminal public trial would apply equally well to a civil public trial.

⁹⁸ International Covenant on Civil and Political Rights, *supra* note 90, art. 14(2); European Convention, *supra* note 92, art. 6(2).

⁹⁹ International Covenant on Civil and Political Rights, *supra* note 90, art. 14(3)(b); European Convention, *supra* note 92, art. 6(3)(c).

¹⁰⁰ This same reasoning was applied to pretrial proceedings in *Gannett Co. v. DePas-*

A public trial helps ensure the integrity of the judicial process. Surveillance by the public and the media pressures both judge and prosecutor to carry out their duties with impartiality and professionalism. Blackstone wrote that the judge must rule "in the face of the country . . . which must curb any secret bias or partiality that might arise in his own breast."¹⁰¹ Bentham spoke of publicity as "the soul of justice; it ought to be extended to every part of the procedure, and to all causes."¹⁰² Other commentators have stressed the openness of a trial as promoting judicial trustworthiness.¹⁰³

Public trials may also facilitate accurate fact-finding. A witness is thought to be more apt to speak the truth in public than in private.¹⁰⁴ Publicity given to the trial may also serve to produce new witnesses who would not have been made aware of an ongoing trial if conducted in secret.¹⁰⁵ Again, public scrutiny helps to assure that all procedural safeguards are properly, fully, and equitably applied; this fairness in turn serves to promote the full and accurate discovery of the truth.

There is also a social interest in the openness of trials that extends beyond the defendant's interest in a fair trial. Public trials serve to educate the public and can lead to reforms and refinements in the

quale, 443 U.S. 368, 387 n.18 (1979), in the context of the sixth amendment. The inclusion of the right to public trial guarantee in the same amendment that contained other fair trial rights indicated that open trials were associated with the rights of the accused. In *Gannett* the Court permitted pretrial proceedings to be closed. More recently, however, the United States Supreme Court refused to view the right to an open trial as belonging to the defendant so that it might be waived. Instead, the Court held the open trial to be an "indispensable attribute of an Anglo-American trial" whereby the Constitution affords the public the right to attend criminal trials — even in the absence of a specific constitutional provision. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980). In so holding, the Court traced the history of public trials from the Norman Conquest of England to the present day and significantly noted the "nexus between openness, fairness, and the perception of fairness. . . ." *Id.* at 570; cf. *Chandler v. Florida*, 449 U.S. 560 (1981) (permitting televised trials).

¹⁰¹ 3 W. BLACKSTONE, COMMENTARIES* 372.

¹⁰² 1 J. BENTHAM, THE RATIONALE OF JUDICIAL EVIDENCE 523 (1827).

¹⁰³ See 6 J. WIGMORE, EVIDENCE § 1834, at 438 (J. Chadbourn ed. 1976); Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534, 538 (1965); Note, *Pretrial Hearings*, 11 TEX. TECH. L. REV. 159, 163–65 (1979); Note, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 66–67 (1979); Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1324–26 (1978).

¹⁰⁴ 3 W. BLACKSTONE, COMMENTARIES* 375.

¹⁰⁵ 6 J. WIGMORE, EVIDENCE § 1834, at 438 (J. Chadbourn ed. 1976). See *Estes v. Texas*, 381 U.S. 532, 583 (1965). "Clearly, the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately." (footnote omitted). *Id.*

criminal process.¹⁰⁶ The ability of the public to participate in the trial by observation may also serve to promote both the retributive and deterrent aspects of the criminal justice system.¹⁰⁷

The most controversial trials also raise complex questions of great import to society at large.¹⁰⁸ Such questions must ultimately be resolved by the public through legislative change or reform. An open trial focuses the public's attention on the ethical, political, and legal questions raised by a case.¹⁰⁹

Thus, apart from international custom and written guarantees, there are sound public policy reasons for safeguarding the right to an open trial. As will be seen, many of the public benefits of open trial are enhanced by the presence of impartial international observers.

C. *International Trial Observers and State Sovereignty*

Occasionally, a government recognizing the right to public trials has refused to permit foreign observers to attend trials on the ground that the presence of an observer might impermissibly interfere in its domestic affairs. In one instance, after having permitted foreign observers on several other occasions, the Iranian government refused a French observer in 1972 on the ground that the trial was "a matter of internal affairs."¹¹⁰ As noted above, a very substantial practice of sending and receiving observers has developed in the last twenty-five years. Hence, this claim of interference must be regarded as suspect, but worthy of scrutiny.

The interplay of Articles 2(7), 55, and 56 of the U.N. Charter provides a point of departure for determining whether certain conduct interferes in a state's domestic affairs. Article 55 provides that the United Nations "help promote . . . universal respect for, and observance of, human rights and fundamental freedoms."¹¹¹ In Article 56 all "members pledge themselves to take joint and separate action

¹⁰⁶ *Gannett Co. v. DePasquale*, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part).

¹⁰⁷ Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6-7 (1960).

¹⁰⁸ See Dreyfus trial report, *supra* note 11; IN RE ALGER HISS (E. Tiger ed. 1979). Other controversial U.S. trials include *Brown v. Board of Education*, 347 U.S. 483 (1954); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹⁰⁹ See Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1904-09 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) ("information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.").

¹¹⁰ C. Bourguet, *La répression en Iran: Rapport sur une mission à Téhéran du 21 au 28 février 1972*, at 7 (Mar. 4, 1972) (unpublished report to the International Association of Democratic Lawyers) [hereinafter cited as *Iran — Bourguet/ AIJD* (1972)].

¹¹¹ U.N. CHARTER art. 55 & art. 56, para. c.

in cooperation with the organization for the achievement of the purposes set forth in Article 55."¹¹²

Pursuant to that authority the United Nations has promulgated the International Bill of Human Rights,¹¹³ which recognizes a right to public trial and a number of other elements of fair criminal proceedings. However, observing a trial calls for observing the internal workings of a nation, at least with respect to its system of justice. Not only does trial observation call for review of the judicial and prosecutorial functions, but the practices of the police and the prison system are also opened to scrutiny. Many nations are not anxious to be so closely examined, believing these matters to be primarily domestic concerns. Governments which object to such scrutiny may rely on Article 2(7), which provides as follows:

Nothing contained in the present Charter shall authorize the United Nations to *intervene in matters which are essentially within the domestic jurisdiction* of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹¹⁴

Under article 2(7) two critical questions arise: (1) What are matters which are "essentially within the domestic jurisdiction"? (2) What sort of conduct constitutes "intervention"?

1. *Are human rights violations matters of essentially domestic concern?*

Most, if not all, governments have in practice considered violations of human rights and fundamental freedoms to be matters of international concern.¹¹⁵ Press reports and the debates of the United

¹¹² U.N. CHARTER art. 56.

¹¹³ The International Bill of Human Rights is comprised of four documents: (a) The Universal Declaration of Human Rights, G.A. RES. 217A, U.N. Doc. A/810, at 71; (b) the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. RES. 2200, 21 U.N. GAOR Supp. (16) 49, U.N. Doc. A/6316 (1967), *entered into force* Mar. 23, 1976; (c) the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A. RES. 2200, 21 U.N. GAOR Supp. (16) 49, U.N. Doc. A/6316 (1967), *entered into force* Jan. 3, 1976; and (d) Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. RES. 2200, 21 U.N. GAOR Supp. (16) 49, U.N. Doc. A/6316 (1967), *entered into force* Mar. 23, 1976; see Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMM'N JUR. 17 (1967); E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* (1964); J. CAREY, *U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS* 12-19 (1970); Newman, *Interpreting the Human Rights Clauses of the U.N. Charter*, 5 HUMAN RIGHTS J. 283, 285 n.7 (1972); Humphrey, *The International Law of Human Rights in the Middle Twentieth Century* in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 75, 85 (M. Bos ed. 1973); E. LUARD, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 53 (1967).

¹¹⁴ U.N. CHARTER art. 2, para. 7 (emphasis added).

¹¹⁵ See Buergenthal, *Domestic Jurisdiction, Intervention, and Human Rights: The International*

Nations organs during the past decade disclose numerous occasions when governmental representatives from perhaps every nation have criticized the human rights misconduct of other countries.¹¹⁶ Ironically, some of the same governments claim interference in their own internal affairs. Such claims appear to be made mostly for reasons of political expedience, rather than out of any belief in their underlying validity.

2. *What is intervention?*

The practices of U.N. bodies and individual states indicate that discussions and recommendations regarding human rights do not violate the non-intervention principles of Article 2(7).¹¹⁷ However, other more direct actions might constitute intervention. The practices of the U.N. and other international organizations indicate that the appropriate response to human rights violations may depend on the gravity and frequency of the violations. There seems to be a con-

Law Perspective, in HUMAN RIGHTS AND U.S. FOREIGN POLICY 111, 114-16 (P. Brown & D. MacLean eds. 1979). But see Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 AM. J. INT'L L. 60, 71-77 (1977) (practice is irrelevant).

The legal debate which still rages over the meaning of Article 2(7) establishes that its meaning is not so "plain" as to prevent recourse to these materials. See Preuss, *Article 2 Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction*, 74 RECUEIL DES COURS 545, 605 n.2 (1949) [hereinafter cited as Preuss]. It was frequently pointed out by delegates at the United Nations Conference on International Organization in San Francisco in 1945 that the terms "to intervene" and "essentially within the domestic jurisdiction" were ambiguous phrases which derived no content from contemporaneous international law. Most important, however, the framers intended that, as a constitutional provision, Article 2(7) had to be "flexible" so that its meaning could be derived through a process of evolution in state practice and international organization. *Id.* at 597 *et seq.*

¹¹⁶ For example, at the 1980 session of the U.N. Commission of Human Rights, Syria critiqued Israel's treatment of the Palestinians. Cuba criticized the United States for its treatment of native Americans; the Soviet Union followed with human rights criticisms of Kampuchea, and of the U.S. for its "political prisoners," poor prison conditions, and treatment of blacks and native Americans. The Ethiopian delegate then discussed human rights violations in the Soviet Union, Chile, and South Africa. The Philippine delegate mentioned Kampuchea. Israel proceeded with a discussion of repression in the Soviet Union and Syria. The Ukrainian delegate mentioned human rights problems in Kampuchea and Northern Ireland. Vietnam discussed problems in Kampuchea, the U.S., Canada, China, Australia, and the Philippines. The Iranian delegate mentioned Afghanistan and Kampuchea as being similar. The Hungarian delegate then expressed concern over Iran's detention of the U.S. diplomats. Italy was concerned over Sakharov in the Soviet Union. Czechoslovakia expressed concern over Guatemala and Equatorial Guinea. Nongovernmental organizations then were permitted to discuss Guatemala, the U.S., Chile, Argentina, Brazil, Indonesia, Singapore, Uruguay, Kampuchea, Nicaragua, Paraguay, Tunisia, Poland, France, the United Kingdom, and Czechoslovakia. The U.N. Commission on Human Rights took actions concerning Chile, South Africa, Israel, Cyprus, Kampuchea, Nicaragua, Guatemala, Argentina, Bolivia, Burma, Ethiopia, Indonesia, Malawi, Paraguay, South Korea, Uganda, and Uruguay. See generally U.N. Doc. E/CN.4/1408.

¹¹⁷ Ermacora, *Human Rights and Domestic Jurisdiction (Article 2, § 7, of the Charter)*, 124 RECUEIL DES COURS 371, 432 (1968).

sensus in the U.N. that massive and flagrant human rights violations may justify the most strident condemnations.¹¹⁸ If a human rights situation threatens international peace, even Security Council action may be justified. At the other end of the spectrum, individual human rights violations generally do not provoke U.N. action beyond debate unless they represent a consistent pattern of gross violations or the Optional Protocol to the Civil and Political Covenant¹¹⁹ applies.¹²⁰

On several occasions United Nations bodies have appointed fact-finding commissions to consider particularly grievous human rights situations.¹²¹ Some of these investigative commissions have been mandated without the consent of the state subject to inquiry,¹²² but it appears clear from U.N. practice that the actual sending of U.N. fact-finding commissions requires consent to avoid domestic interference.¹²³ Since representatives of an international organization are not admitted as of right, this suggests that individual sovereign states may also send observers only at the sufferance of the receiving state, even though domestic observers may attend as a matter of right.

While the United Nations, other intergovernmental organiza-

¹¹⁸ G.A. Res. 32/130, 32 U.N. GAOR, Supp. (No. 45) 150, U.N. Doc. A/32/45 (1977).

¹¹⁹ See note 113 *supra*.

¹²⁰ Of course, it is unclear whether this graduated approach is merely a record of U.N. prudence or represents the jurisprudence of Article 2(7).

¹²¹ See, e.g., Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Human Rights in Democratic Kampuchea, 35 U.N. CHR, U.N. Doc. E/CN.4/1335 (1979); Interim Report of the Ad Hoc Working Group of Experts of the Commission of Human Rights, 30 U.N. CHR, U.N. E/CN.4/1135 (1974); Report of the Ad Hoc Working Group of Experts of the Commission on Human Rights, 26 U.N. CHR, U.N. Doc. E/CN.4/1020 (1970); Report of the Ad Hoc Working Group to Inquire into the Situation of Human Rights in Chile, 33 U.N. GAOR, U.N. Doc. A/33/331, at 1 and Annex I (1978).

¹²² Ermacora, *International Enquiry Commissions in the Field of Human Rights*, 1 HUMAN RIGHTS J. 180, 188 (1968) [hereinafter cited as Ermacora, *Enquiry Procedures*]; van Bouen, *Fact-Finding in the Field of Human Rights*, 3 ISRAEL Y.B. HUMAN RIGHTS 93, 107-15 (1973) [hereinafter cited as van Bouen]. Although the League of Nations enquiry commissions were never appointed without the consent of the concerned parties, see W. SHORE, *FACT-FINDING IN THE MAINTENANCE OF INTERNATIONAL PEACE* 25 (1970) [hereinafter cited as SHORE], the U.N. has conducted extended enquiries in South Africa, Israel, and Chile over the objections of those governments. Rapporteurs have, in addition, been asked to provide substantial reports on human rights conditions in such nations as Equatorial Guinea (U.N. Doc. E/CN.4/1371 (1980)), Kampuchea (U.N. Doc. E/CH.4/1335 (1979)), and Nicaragua (U.N. Doc. E/CN.4/Sub.2/426 (1979)), as well as on the disappeared persons in Chile (U.N. Doc. E/CN.4/1362 (1980)). Communications regarding human rights violations under Economic and Social Council Resolution 1503 (XLVIII) E.S.C. Res. 1503, 48 U.N. ECOSOC, Supp. (No. 1A), U.N. Doc. E/4832/Add.1 (1970), must have the express consent of the concerned state before they can be the subject of thorough on-site investigations, but direct contacts under resolution 1503 have permitted some related fact-finding.

¹²³ Leary, *When Does the Implementation of International Human Rights Constitute Interference into the Essentially Domestic Affairs of a State — The Interactions of Articles 2(7), 55 and 56 of the U.N. Charter*, in *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* (J. Tuttle ed. 1978).

tions, and governments may be capable of interfering in the domestic affairs of nations, nongovernmental organizations are not subject to the same sovereignty objection. The principle of non-intervention regulates relations between states but not the conduct of individuals or nongovernmental organizations, which are merely groups of individuals. The rationale for the principle of non-interference: governments mutually wish to avoid disturbing each other's domestic tranquility, because states possess military, economic, and other coercive powers which must be kept in check if nations are to remain at peace. Since nongovernmental organizations lack such powers, they do not have the capacity to interfere impermissibly in the internal affairs of states, providing they do not violate domestic law.

It is true that nongovernmental organizations often criticize governments for their human rights violations and send fact-finding missions to determine whether violations are occurring. But it would be difficult for a state to characterize these activities as a threat to its sovereignty, since for the most part private trial observers attend proceedings which should be open to the public and press in any event. Observers rarely make public statements about the trial while it is in progress. Moreover, observers are generally distinguished lawyers who can be trusted not to disrupt the proceedings. Hence, a government cannot legitimately contend that nongovernmental trial observers interfere in its internal affairs. In fact, only one or two lower-level officials in a few countries have actually raised such an objection, and most nations have freely admitted observers to trials.

Limited governmental observation at foreign trials is arguably not sufficient to constitute interference with another state's sovereignty. Attendance by diplomats is very similar to consular visits to trials involving a country's own citizens who are arrested abroad. No challenge to sovereignty need be implied; attendance merely reflects interest in the case as an important event.

Except for Lord Russell's report on the Dreyfus trial, no embassy has ever issued a public report as a result of trial observation — much less a report during the proceedings themselves. While the presence of the diplomatic observer may make the litigants and the court somewhat more careful, that extra caution will presumably ensure that the nation's own laws and procedures are fairly enforced — hardly an illegitimate interference in the internal affairs of another country. While major governmental fact-finding missions, like U.N. missions, probably require the consent of the observed nation, low-key diplomatic observation should not be considered undue interference with a state's internal affairs.

D. *Sovereignty Over Frontiers and Admission of Observers*

In one respect questions of national sovereignty may arise in many nongovernmental observer missions since every state has the right to regulate entry across its frontiers.¹²⁴ Accordingly, a nation may refuse an observer the right to cross its borders just as it may refuse entry to any foreigner. The Dominican Republic under President Trujillo¹²⁵ and the Soviet Union have denied visas to trial observers.¹²⁶ Nongovernmental organizations may respond by selecting trial observers who do not, because of their nationalities, require visas. These individuals may still be turned back at point of entry, as happened to an I.C.J. observer in Poland during 1980.¹²⁷ But once observers actually arrive — particularly at a courthouse — most governments do not refuse them entry to fulfill their missions. It might also be suggested that a nation's absolute sovereignty over its borders should be limited when the sole reason for denying entry is to deny access to trials of human rights importance.¹²⁸ Certainly, nations that do not admit observers are roundly criticized and it is always inferred that they have reason to conceal the proceedings.¹²⁹ Fear of embarrassment usually suffices to overcome any reluctance to admit a trial observer.

E. *Domestic Limitations on the Right to Public Trial and the Role of International Observers*

Articles 10 and 11 of the Universal Declaration of Human Rights¹³⁰ provide for public trial without apparent exception. However, Section 2 of Article 29, in reference to the entire Declaration, limits the exercise of the rights to the "just requirements of morality, public order and the general welfare. . . ."¹³¹ Accordingly, the right

¹²⁴ See, e.g., *Ekiu v. United States*, 142 U.S. 651, 659 (1891); *Chae Chan Ping v. United States*, 130 U.S. 581, 630-04 (1889); J. BRIERLY, *THE LAW OF NATIONS* 162 (6th ed. 1963).

¹²⁵ See note 71 *supra*.

¹²⁶ *Trial of Intellectuals in Moscow*, International Commission of Jurists, Press Release (Jan. 24, 1968); International Commission of Jurists, Press Release (Dec. 25, 1970); *Repression in Eastern Europe* 1 INT'L COMM'N JUR. REV. 1, 5 (1969); *ICJ Protests Against Bukovsky Trial*, International Commission of Jurists, Press Release (Jan. 11, 1972); *Dissident Orthodox Priest Goes On Trial in Moscow*, N.Y. Times, Aug. 26, 1980, at 5, col. 1.

¹²⁷ Poland — Madding/ICJ (1980), *supra* note 74.

¹²⁸ See G. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 162-63 (1978).

¹²⁹ See, e.g., Amnesty International, *Violations of Human Rights and Fundamental Freedoms in the Democratic Republic of Afghanistan* 14-15 (mimeo 1979) (refusal to let an observer see an allegedly tortured prisoner gives greater credibility to torture charges).

¹³⁰ Universal Declaration, *supra* note 87.

¹³¹ *Id.* at 77.

to a public trial is constrained by morality and national security.¹³² Many national constitutions and laws also make exceptions to the right to public trial in the interest of public order and morality.¹³³

The International Covenant on Civil and Political Rights lists five separate exceptions to the right to a public trial: (1) moral concerns, (2) public order, (3) national security, (4) privacy interests of the parties, and (5) prejudice to the judicial process because of publicity.¹³⁴ The European Convention adds an exception where the interests of juveniles require privacy.¹³⁵ The scope of these exceptions is conceivably so broad as to place practically no restraint on secret trials.¹³⁶ In practice, however, the exceptions do not significantly undercut the right.

1. *Moral Concerns.*

The public may be excluded from the courtroom where the prosecution or testimony may have a corrupting influence.¹³⁷ The public

¹³² During the debate on Article 11, the delegate of the U.S.S.R. stated that in the interest of public morality or national security, it was necessary to carry on the judicial process in secret. At the request of the French delegate, the delegate from Yugoslavia explained that Section 2 of Article 29 covered the situations of concern to the Russian delegate. This was apparently found satisfactory. The Russian delegate also proposed similar exclusions for Article 10 at the Third Committee of the General Assembly. The majority rejected the proposed amendment (which also included the right of the defendant to be heard in his native language) on the basis that its provisions did not belong in a Declaration intended to be general in nature, and that by providing for a "fair" trial, the concerns expressed by the amendment had already been addressed. Urged by the delegates of Uruguay and Australia, the French delegate expressed his opinion that the defeat of the Russian amendment did not indicate that the delegates had voted against the purpose of the Russian amendment. VERDOODT, *supra* note 89 at 128-29, 135.

¹³³ See, e.g., STRAFPROZESSORDNUNG ch. 18, § 229 (Austria 1975); CODIGO DE PROCESSO PENAL art. 792, § 1 (Braz. 1941); BULG. PENAL CODE ch. 14, sec. 1, art. 2 § 2 (1974); EGYPT CONST. ch. IV, art. 169 (1972); CODE DE PROCEDURE PENALE art. 306 (Fr. 1978-79); GAMBIA CONST. 20 (9) and (10)(a) (1971); JAMAICA CONST. ch. III, § 20(4) (1972); MOROCCO PENAL PROC. CODE art. 303 (1959); LAW OF THE ORGANIZATION OF THE JUDICIARY, No. 62-11, art. 2 (Niger 1962); CODIGO DE PROCESSO PENAL art. 407 (Port. 1972); ROM. PENAL PROC. CODE art. 290 (1968); SIERRA LEONE CONST. ch. 11 § 13(3) (1979); ACT OF THE ORGANIZATION OF THE JUDICIARY tit. 14, § 172(1) (W. Ger. 1949); YUGO. CONST. art. 227 (1974).

¹³⁴ See note 90 *supra*.

¹³⁵ See note 92 *supra*. The American Convention on Human Rights simply provides one overall exception: "Criminal proceedings shall be public; except insofar as may be necessary to protect the interest of justice." See note 91 *supra*.

¹³⁶ J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 150 (1969) [hereinafter cited as FAWCETT]; Z. NEDJATI, HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION 116 (1978).

¹³⁷ E.g., *United States v. Kobli*, 172 F.2d 919 (3rd Cir. 1949) (youthful spectators may be excluded in cases involving matters which would have a demoralizing effect on their immature minds, but not all adult spectators may be excluded for this reason); *State v. Adams*, 100 S.C. 43, 84 S.E. 368 (1915) (defendant cannot complain that during his trial for bastardy, the court excluded from the courtroom all negroes and boys); *Tilton v. State*, 5 Ga. App. 59, 62

may also be excluded to protect a witness who, because of acute embarrassment or fear, may not testify truthfully. The latter situation almost always involves a minor in a sex related case.¹³⁸ Moral reasons may thus be measured in terms of impact on the observers and on the observed. Even when most spectators are cleared from the courtroom, certain members of the public who have a special connection to the proceedings, such as members of the bar or members of the press, are often allowed to remain.¹³⁹ Where there is not a total exclusion of interested observers, an international observer should also be permitted to remain, since the rationale for permitting members of the bar or press to attend applies equally well to the foreign observer.

2. *Public order* (ordre public).

Public order, or "*ordre public*" as it appears in the Declaration, is an ambiguous term which can mean public order both in the narrow sense of a secure and orderly public proceeding and in the broad sense of general public welfare.¹⁴⁰ In the context of the right to a public trial, it almost certainly means maintaining order in the courtroom rather than avoiding post-trial disruptions caused by the comments of trial observers.

Traditionally, the public can be excluded from a trial to maintain the order of the courtroom.¹⁴¹ The exclusion order need not cover persons with a special connection to the trial, such as members of the press or bar, provided they are not disruptive.¹⁴² Trial observers also should be admitted if they do not disrupt the proceedings or

S.E. 651 (1908) (court may exclude all minors and women from sexually related trial but not everyone; jury felt pressured to convict and defendant suffered by not having the public hear his testimony).

¹³⁸ *E.g.*, *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958) (exclusion proper where in a rape case, witnesses are 7, 9, and 11 years old; members of the bar, press, relatives or close friends of the defendant, and witnesses not excluded); *Hogan v. State*, 191 Ark. 437, 86 S.W. 2d 931 (1935) (exclusion proper during testimony of ten-year-old rape victim).

¹³⁹ *E.g.*, *State v. Croak*, 167 La. 92, 118 So. 703 (1923) (exclusion order excepted counsel, jury, officers of the court, relatives of the accused and of the prosecuting witness, persons who had some special interest in the case, and those who specially requested to be admitted); see notes 137-38, *supra*.

¹⁴⁰ See FAWCETT, *supra* note 136, at 150; Van Der Meersch, *Does the Convention have the force of 'ordre public' in municipal law?*, in HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 97-150 (A. Robertson ed. 1968).

¹⁴¹ *E.g.*, *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965) (when defendant and sympathizers attempted to prevent orderly presentation of case, public excluded except for members of the press and bar); *Davis v. United States*, 247 F. 394 (8th Cir. 1917) (error to exclude spectators who were decorous; original order excluded all except relatives of the defendants and members of the bar and press).

¹⁴² See sources cited at note 141 *supra*.

issue disruptive reports outside the courtroom during the trial. In rare cases the presence of a trial observer may encourage disruptive behavior by defendants or witnesses, but the interest in having an impartial observer should outweigh this rare possibility.

3. *National security.*

National security considerations arguably justify not only exceptions to the right to a public trial, but exceptions to many other human rights as well.¹⁴³ And unlike the exceptions for morality or public order, the determination that national security requires a private trial is not made by the court itself.

The most important recent discussion of national security as balanced against due process is *Agee v. United Kingdom*.¹⁴⁴ Agee, a former employee of the United States Central Intelligence Agency, argued that Article 5 of the European Convention on Human Rights was violated by the unreviewable decision of the British Home Secretary to deport him for undisclosed national security reasons. He argued that to make deportation a matter of administrative discretion based on secret evidence at secret hearings would "not only provide *carte blanche* to a government determined to use administrative discretion to avoid the perils of having to employ due process of law but would fly in the face of the principle of equality before the law."¹⁴⁵ The European Commission on Human Rights found that unless the government's administrator acted illegally, Article 5 due process protections were not violated and Agee's application for relief was inadmissible.¹⁴⁶ The Commission considered Agee's deportation to be a noncriminal matter beyond its scope. This decision suggests that criminal proceedings that a government might wish to keep secret on national security grounds would almost certainly be subject to far greater public scrutiny.

Bulgaria and the People's Republic of China are the only nations which have actually raised the issue of national security to exclude international trial observers. In the *Spetter* case the Bulgarian gov-

¹⁴³ National security is the basis of an exception to the following rights: the right to peaceful assembly (International Covenant, art. 21; European Convention, art. 11; American Convention, art. 16); freedom of movement and residence (International Covenant, art. 12; American Convention, art. 22); freedom of expression (International Covenant, art. 19; European Convention, art. 10; American Convention, art. 13); freedom of association (International Covenant, art. 22; European Convention, art. 11; American Convention, art. 16).

¹⁴⁴ *Agee v. United Kingdom*, 7 DECISIONS AND REPORTS OF THE EUR. COMM. OF HUMAN RIGHTS 164 (Application 7729/76, Decision of 17 December 1976).

¹⁴⁵ *Id.* at 168.

¹⁴⁶ *Id.* at 176.

ernment excluded the public on the ground that state secrets might be disclosed.¹⁴⁷ China excluded foreign observers from the trial of the so-called Gang of Four, also on the ground that national secrets might be disclosed.¹⁴⁸ Such claims of national security are easily made and require careful international scrutiny to determine if they are justified. Moreover, foreign observers and lawyers have often been admitted to proceedings otherwise closed to the public on national security grounds.¹⁴⁹

4. *Privacy interests of the parties.*

The "interest of the private lives of the parties" is a phrase fraught with ambiguity. One commentator has suggested that the wording could exclude from public trial matters that, if revealed, could be "uncomfortable, politically inconvenient, or commercially damaging."¹⁵⁰ A Belgian court has attempted to limit the scope of this exception by interpreting "private" to mean "familial" — the exception would apply only when "the repercussions of a public hearing would be so grave and far-reaching as to endanger the emotional ties or family situation of the individual concerned or his near relations."¹⁵¹

Even if the "interest of the private lives of the parties" is limited to matters *intra familial*, the breadth of the exception is still not clear. In *Scott v. Scott*,¹⁵² the British House of Lords specifically found that divorce proceedings were not properly held *in camera* and held that there were only three exceptions to the right to public trial:

¹⁴⁷ Bulgaria — Spetter, *supra* note 68.

¹⁴⁸ *Mao's Widow, 9 Others on Trial in Peking*, Wash. Post, Nov. 21, 1980, at 1, col. 2.

¹⁴⁹ In Portugal and Syria trials are not open in cases involving moral turpitude and international security, but lawyers are permitted to attend all trials; in Portugal foreign observers have also been permitted to attend such proceedings. In Thailand foreign observers were admitted to military proceedings which were officially closed to the public. In the trial of the Thammasat 18, the observers and the press were excluded only during testimony concerning the charge of high treason. Letter from Thomas Conlon, United States Embassy in Thailand, Counselor for Political Affairs, to Peter Andersen, member of Amnesty International, at 3 (Sept. 1, 1978).

The public was cleared from an Israeli court during the testimony of the Secret Police to avoid revealing their identity to those who might wish to take vengeance on them. The AI observer, however, was allowed to remain during the testimony. J. Mortimer, Report on a Legal Mission to Israel 1-6 June 1975, at 6 (June 9, 1975) (unpublished report to Amnesty International) [hereinafter cited as Israel — Mortimer/AI (1975)]. Similarly, the I.C.J. observer was admitted to the Sithole trial in Rhodesia even though the trial was held *in camera*. See *Africa*, 1 INT'L COMM'N JUR. REV. 57-58 (1969); interview with Niall MacDermot in Geneva, March 6, 1981.

¹⁵⁰ FAWCETT, *supra* note 136, at 149.

¹⁵¹ Tribunal Correctional, Brussels (17.3-1966) 8668/B/65 as quoted in FAWCETT, *supra* note 136, at 151 n.1.

¹⁵² [1913] A.C. 417.

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of Justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and thirdly, in those cases where secrecy, as for instance the secrecy of a process of manufacture or discovery or invention — trade secrets — is of the essence of the cause.¹⁵³

The ambiguity of the International Convention language, "interest of the private lives of the parties" could conceivably cover divorce proceedings as well as recognized domestic exceptions such as guardianship and lunacy proceedings, although *Scott v. Scott* holds otherwise. Indeed, several American cases have held that divorce proceedings may be conducted *in camera*.¹⁵⁴

Even if this exception is broadly applied, it should only minimally interfere with the work of the trial observer. Most proceedings that deal with the private affairs of the parties will be of negligible interest to international observers,¹⁵⁵ except insofar as they desire simply to ensure the proper functioning of the system. In this instance, the observer could be admitted so long as any report made no reference to private matters and discussed only the adequacy of the procedures themselves.

5. *Prejudice to the judicial process because of publicity.*

"Special circumstances" must be shown before this exception to the right to a public trial can be invoked. For example, where widespread coverage of pretrial proceedings would make a fair trial impossible, closed proceedings may be justified.¹⁵⁶ Also, where there is danger of sensationalizing the use of narcotic drugs that are generally unknown to the populace, *in camera* proceedings may limit the spread of drug abuse.¹⁵⁷

Where "special circumstances" exist, publicity should be restricted only to the extent strictly necessary. If jury prejudice is the

¹⁵³ *Id.*

¹⁵⁴ *E.g.*, *In re Shortridge*, 99 Cal. 526, 34 P. 227 (1893); *C. v. C.*, 320 A.2d 717, 722-23 (Del. Super. Ct. 1974); *State of Florida ex rel. Gore Newspaper Co. v. Tyson*, 313 So. 2d 777, 788 (Fla. 1975) (press and public not properly excluded from divorce proceedings when no reasons of any kind were put forward by parties to show why a private trial should have been conducted).

¹⁵⁵ Since "lunacy" proceedings have been abused for political purposes in the Soviet Union, there may be a particular need to place observers in such cases. Even if the subject of the mental commitment proceedings may be found incompetent to waive any rights of privacy so that an observer can attend, the family in such cases should be given the right to permit foreign observers to attend.

¹⁵⁶ *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

¹⁵⁷ *Tribunal Correction, Brussels* (27.1-1965) 645/Soc./63, quoted in FAWCETT, *supra* note 136, at 150 n.2.

concern, the proceedings should be open to the public once the jury is selected and sequestered; if publicity concerning narcotic drugs is thought dangerous, the public could perhaps be excluded only during testimony concerning the nature and effect of the drugs.

In the case of a trial observer, exclusion from the courtroom might never be "strictly necessary."¹⁵⁸ Most observer reports are issued after the trial and could not prejudice the proceedings. Any matters thought dangerous or adverse to the interests of justice could be excluded from the observer's report. Observations regarding fairness could still be made without "prejudicing the interests of justice."

The basic right to a fair and open trial is the principal support for the right of observers to attend trials. Observers help guarantee the fairness of the trials they attend. While there are specific exceptions to public attendance, only in rare circumstances should they be raised to exclude qualified trial observers.¹⁵⁹

III. THE ROLE OF OBSERVERS

A. General Considerations

The trials which international observers attend are often contro-

¹⁵⁸ The Pakistani government misused the interest of justice and public order exceptions to the right of public trial in the *Bhutto* case; the press and an ICJ observer attended four days of testimony and then were barred from the remainder of the trial in the "interest of justice" and to maintain order in the courtroom. J. Williams, Report on Appeal of Zulfikar Ali Bhutto to the Supreme Court of Pakistan 11 (1978) (unpublished report to the International Commission of Jurists) [hereinafter cited as Pakistan — Williams/ICJ (1978)]. The observer concluded that the grounds "were spurious and dictated not by the needs of the administration of justice, but by a desire to inhibit pro-Bhutto publicity." *Id.* at 12. The Soviet Union and Czechoslovakia have also been criticized by members of the Human Rights Committee in regard to their failure to provide public trials as required by their treaty obligations under the U.N. Covenant on Civil and Political Rights. See U.N. Docs. CCPR/C/1/Add. 22, at 14; CCPR/C/SR. 109, at 46 & 59; CCPR/C/SR. 60 & 65, at 6; see generally J. Walkate, The Human Rights Committee: Monitoring the Implementation of the International Covenant on Civil and Political Rights 54-55 (1980) (unpublished memorandum).

¹⁵⁹ In some countries the right to a public trial may be less important in assuring the success of observer missions than the prestige of the observer and the sponsoring organization. For example, the International Commission of Jurists sent an American observer to a Moroccan trial which was otherwise closed to the public; the observer was promptly given passes to attend. See S. Suckow, Observer Report on Trial Held Before a Military Court in Kenitra, Morocco, January 15-18, 1974 (unpublished report to the International Commission of Jurists) [hereinafter cited as Morocco — Suckow/ICJ (1974)]. Foreign observers were permitted even when the Greek government of the Colonels was regularly denying the public the right to attend trials by such tactics as filling the room with government agents, selecting a small courtroom, falsely saying that the room was full, and taking the names of all attendees and harassing them afterwards. See J. Bourgaux, Le procès d'Athènes 2 (Feb. 1, 1973) (unpublished report to the International Association of Democratic Lawyers) [hereinafter cited as Greece — Bourgaux/AIJD (1973)]; C. Grobet, Le procès de M. Stathis Panagoulis 18-20 janvier 1973, at 6-7 (undated) (unpublished report to the International Commission of Jurists).

versial. Because of their highly political nature, the government is often tempted to treat the defendant unfairly. The government may wish to publicize the sensational aspects of the trial, or avoid publicity and expedite the outcome. In either case, procedures may be abused to achieve the desired ends. The role of the trial observer is to try to ensure that a defendant receives all the procedural protections guaranteed by law, regardless of any bias of the populace or government.

An observer can be a more effective monitor than the public because of his or her expertise and prestige. An observer is usually a trained lawyer who has participated in previous trials. He or she thus knows better than the public or press whether the defendant has been treated fairly by the prosecutor and judge. In most cases, the observer prepares an account which may be published by the sponsoring organization or government. The participants in the trial usually understand the observer's presence to mean that the proceedings may receive international attention. Consequently, they may act differently than they would before even a large domestic crowd. The combination of experience, credentials, and organizational or governmental affiliation makes the observer more effective in helping to bring about a fair trial than the public or even the press.

A trained observer is also apt to note that important witnesses or pieces of evidence are missing from the trial. He or she may be able to pursue independent fact-finding to discover evidence which should have been presented at trial.

The immediate goal of the observer is to determine whether the defendant has received a fair trial under applicable law. There is no doubt, however, that the work of observers also contributes to public awareness and influences the ultimate public judgment of the trial. Through press releases, reports, lectures, and other means observers communicate their impressions to the public at large.¹⁶⁰ They may thus encourage reform, express outrage at corruption, or praise fairness — helping to shape the public reaction to the trial specifically and the criminal process generally. Observers facilitate the public debate and reckoning that are among the primary purposes of public trial.

B. *Reasons for Sending Trial Observers*

There are four principal reasons for sending an observer to a trial of human rights interest. These purposes may substantially affect the

¹⁶⁰ See text accompanying notes 305–16 and 364–82 *infra*.

choice of trial, the selection of an observer, and other steps in the process of trial observation.

The first function that an observer can perform is to gather facts firsthand and prepare an impartial, independent, and objective report.¹⁶¹ Second, an observer's presence necessarily makes the participants — particularly the judge and prosecutor — more circumspect in the face of authoritative and independent criticism.¹⁶² Third, an observer gives the defendant, the defense attorney, and the defendant's supporters a sense of international assistance and renewed confidence.¹⁶³ Fourth, the observer represents an organization or government and expresses its concern about the fairness of the proceedings.¹⁶⁴

¹⁶¹ *Projet d'un Code de déontologie des observateurs judiciaires de la Fédération Internationale des Droits de l'Homme* arts. 2-3. See note 463 *infra*.

¹⁶² One Amnesty International observer stated in his report, "During my stay in Maseru, I had several discussions with the Minister of Justice and with the prosecutor, as well as a short conversation each with the Chief Justice and the Director of Prisons. I like to think that some of the matters discussed in these conversations would rebound to the cause of justice in the present trial." B. van Niekerk, Report to Amnesty International on Visit to Lesotho at 4 (Nov. 18, 1974) (unpublished report to Amnesty International) [hereinafter cited as Lesotho — van Niekerk/AI (1974)].

In its 1965-66 Annual Report Amnesty International noted: "the mere presence of a lawyer from a reputable and genuinely impartial organization may cause the judicial authorities to hesitate in imposing harsh sentences." AI, ANNUAL REPORT 1965-66, at 9 (1966). Military observers under NATO may have less impact on the judge's conduct of the trial. See J. Williams, *An American's Trial in a Foreign Court: The Role of the Military's Trial Observer* at 65 (April 1966) (unpublished thesis in University of Virginia Law Library) [hereinafter cited as Williams Thesis].

¹⁶³ Professor Noll reported about his mission to Turkey: "I had the impression that my presence in Turkey was useful to the cause of freedom and Rule of Law. Many persons to whom I spoke told me that it was important to attract international legal interest in the situation in Turkey, and they felt encouraged by the struggle of the International Commission of Jurists on behalf of the Rule of Law." P. Noll, *Observer Mission to Turkey*, 27 February to 6 March 1973, at 6 (undated) (unpublished report to the International Commission of Jurists) [hereinafter cited as Turkey — Noll/ICJ (1973)]. An even clearer instance: "When the foreign observer enters the court, one of (the defendants) . . . jumps up with his arms stretched out and shouts a clearly audible 'merci'. Obviously the accused feel the presence of an observer as moral support. For many of them it is proof that the world is concerned about them." H. Woesner, *The Political Trial of Kenitra*, June-July 1973, at 4 (July 26, 1973) (unpublished report to Amnesty International). In another case an Iranian defendant was emboldened by the presence of an Amnesty International observer to remove his shirt in the courtroom to show marks of torture, even though the remainder of the room was filled with Savak agents. Iran — Albala/AI (Feb. 1972), *supra* note 67, at 4; see also A. Leaud, *Rapport au procès de Jesus Diz Gomez et al.* at 1 (Sept. 19, 1975) (unpublished report to Amnesty International) [hereinafter cited as Spain — Leaud/AI (1975)]; cf. Williams Thesis, *supra* note 162, at 76 (defense counsel embarrassed by observer's presence). Occasionally, the observer may sympathize with the prosecution. See, e.g., Galvin, *War Crimes Trials in Nicaragua*, GUILD NOTES, Nov. 2, 1981, at 1, 17.

¹⁶⁴ In two cases the basic idea was simply to let the countries know that the world was watching. A. Larson, Report on the Trial of 37 South West Africans Under the Terrorism Act at 1 (Mar. 28, 1968) (report to the Program Board of the Division of Overseas Ministries, Lutheran World Federation) [hereinafter cited as South West Africa — Larson/LWF (1968)].

These functions may conflict. If an observer overtly attempts to influence the conduct of the trial, his or her impartiality and independence may be questioned. If an observer openly comforts the defendant, his impartiality becomes suspect and his report may be subject to question.¹⁶⁵ Conversely, an observer might be so aloof that the defendant's supporters may feel betrayed and the defendant may be subjected to unfair procedures on which the observer fails to comment.¹⁶⁶

If an observer consciously attempts to fulfill all four of these objectives, she must carefully consider each step in her mission so as to minimize the potential for conflict. Some observers initially do not acknowledge that they have any role other than the preparation of an accurate and impartial report. Nevertheless, when questioned about the effects of their mission upon the trial participants' behav-

"J'ai été envoyé par . . . d' informer des autorités iraniennes du souci des trois organisations représentatives de l'opinion publique . . ." Iran — Zavrian/FIDH (1973), *supra* note 67, at 1.

Nongovernmental organizations may also have specific concerns related to their membership or purpose. For example, the International Confederation of Free Trade Unions sent observers to the 1978 trials of Tunisian labor leaders. Interview with John Vanderveken, Assistant General Secretary of the International Confederation of Free Trade Unions, in Brussels (Mar. 14, 1979). The International Association of Democratic Jurists sent an observer to the trial of 17 persons accused of membership in the Communist party. Greece — Bourgaux/AIJD (1973), *supra* note 159. The Lutheran World Federation sent an observer to a trial of Lutherans in Namibia. R. Deffenbaugh, Namibian "Terrorism" — South African "Justice" 5 (1976) (unpublished manuscript) [hereinafter cited as Namibia — Deffenbaugh/LWF (1976)]. The I.C.J. as an organization of lawyers tried to send an observer to a Polish trial where it was feared defense attorneys would not be able to speak freely (*The Poznan Trials*, 6 BULL. INT'L COMM'N JUR. 1 (1956)) and to a Spanish trial where labor lawyers were charged. S. Suckow, Report on the Trial of 2 Labour Lawyers and 8 Workers in Barcelona March 4-5, 1975 (Mar. 13, 1975) (unpublished report to the International Commission of Jurists). The International Press Institute co-sponsored an observer for the South African trial of the Rand Daily Mail Editor-in-Chief. *Action for the Rule of Law*, 36 BULL. INT'L COMM'N JUR. 46 (1968).

¹⁶⁵ Interestingly, the first British observer sent by Amnesty International to France sat with the defendant's counsel at trial and evidently saw her role as lending "solidarity" to the defense. *See* note 23 *supra*. The International Commission of Jurists observer at a South African trial noted the difference between his role and the role of an observer from the Lawyer's Committee for Civil Rights Under Law: "Mr. Peay . . . felt able to identify with 'the defense team' in a way that I, as a representative of the ICJ and other organizations, did not. He had close contacts with the accused and their families and the accused were left in no doubt that the presence of observers at the trial mirrored the concern of international legal, Christian and diplomatic circles at the trial and its implications." S. Africa — Archer/ICJ (June 4, 1975), *supra* note 76, at 7.

¹⁶⁶ In one instance the 40 defendants were deprived of counsel during the trial — a fact which the observer reported, but he made no attempt to comment or arrange for representation, even though the accused could have received the death penalty. *See* Turkey — Noll/ICJ (1973), *supra* note 163, at 2. By way of contrast, the National Lawyers Guild observer at a war crime trial in Nicaragua was clearly sympathetic to the prosecution. Galvin, *War Crimes Trials in Nicaragua*, 10 GUILD NOTES 1, 17 (Nov. 2, 1981).

ior, they usually admit that they have had a decided impact.¹⁶⁷

Different trials may require a different, distinct balance of purposes. When New York Criminal Court Judge William Booth attended a trial in Namibia on behalf of the International Commission of Jurists (I.C.J.), he stayed in the home of one of the chiefs of the defendants' tribe.¹⁶⁸ While Judge Booth sacrificed part of his appearance of impartiality, he dramatically demonstrated the support of the I.C.J., the United States, and the world black community for the oppressed Namibian people.

On another occasion, Alexander Lyon, a British barrister and member of Parliament, arrived at a trial in Namibia to find that the defendants had no counsel. He was instrumental in arranging for the defendants to obtain competent defense counsel.¹⁶⁹ Although Lyon's conduct may have compromised the appearance of impartiality which an observer should maintain, in those circumstances it was appropriate that he actively assure a fair trial rather than merely report that the defendants lacked counsel.

Because of the inherently contradictory functions of observers, and because it is impossible to predict the precise situation in which they may be placed, past experience teaches that they must be left free to use their own judgment in the situations which they encounter.¹⁷⁰

¹⁶⁷ The Belgian observer Aronstein noted his dual role as an independent, objective reporter and as an influence for greater respect for human rights and fairness. Aronstein, *Acquittement à Madrid*, 127 REVUE SOCIALISME 37 (1975).

¹⁶⁸ Letter from Reverend Colin O'Brien Winter to the International Commission of Jurists (Feb. 18, 1972).

¹⁶⁹ A. Lyon, Trial of the Strikers in Windhoek, Namibia 1-3 (Feb. 8, 1972) (unpublished report to the International Commission of Jurists). Yet a further example of such active intervention by an observer was provided by a U.S. military observer, who was attending the trial of a young American black soldier for robbery in Germany. The American lawyer was observing the trial pursuant to the NATO Status of Forces Agreement and ordinarily any unfairness of the trial should have been reported to the attorney's military supervisors, who would have determined if the issue should be raised with German military authorities, who might then discuss the problem with the prosecutor and others in the criminal justice system. Williams Thesis, *supra* note 162, at 51-53. Instead, the observer merely mentioned to the defense counsel that he did not believe that the defendant's translator was accurately rendering the English-German translation of the defendant's statements. Immediate action was taken by the court to find a more satisfactory translator. Interview with Max Johnson, *supra* note 9.

¹⁷⁰ It has also been suggested by Mr. Martin-Achard that the other cardinal rule for an observer is that he should do nothing which would damage the defendant's case, even if the observer is not able to help in any way. Martin-Achard, *Political Trials and Observers*, 6 INT'L COMM'N JUR. REV. 24 (1971). There may be a hierarchy of norms surrounding the observer, however; the first objective must be obedience to the instructions of the sending organization or government. Those instructions usually require an accurate report of the observer's findings; the other functions of encouraging procedural fairness and reassuring the defendant must be considered subsidiary to the observer's loyalty to her instructions. Accordingly, Mr.

C. *Choice of Trials*

Private organizations and governments may have distinct purposes for sending observers and may thus have different criteria for determining which trials merit observation. There is, however, surprising uniformity among the private organizations themselves. Amnesty International, the International Association of Democratic Lawyers, and the International Commission of Jurists appear to select trials for observation in very similar ways and, in fact, often send observers to the same trials.¹⁷¹ Some of the criteria used by governments and organizations are described below.

Much ink has been spilled in defining what constitutes a political offense, political trial, or political prisoner.¹⁷² Trials that involve of-

Martin-Archard's suggestion may stray too far from the impartial reporting function in some circumstances.

Trial observers have occasionally been requested to act on unrelated human rights problems, which came to their attention during their missions. An International Commission of Jurists observer assisted a detained AI member in South Korea. *See* A. Sanguinetti, Report on the Trial of Saw Sung in Seoul, November 23, 1972, at 5 (Nov. 30, 1972) (unpublished report to the International Commission of Jurists) [hereinafter cited as S. Korea — Sanguinetti/ICJ (1972)]. The AI member was released the next day, but this experience raises a question as to whether the observer exceeded his mandate. Ultimately, the observer must decide under the circumstances what efforts are appropriate and consistent with the desires of the sending organization.

¹⁷¹ *See, e.g.*, Greece — Bourgaux/AIJD (1973), *supra* note 159, at 4 (six observers).

¹⁷² Many attempts at defining the term "political offense" are made in addressing the issue of the scope of the exemption from extradition for those accused of politically motivated crimes. *See, e.g.*, Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247, 248 (1933); Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition — A Proposed Judicial Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217, 218 (1969); Epps, *Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61, 64-68 (1979); Gold, *Non-Extradition for Political Offenses: The Communist Perspective*, 11 HARV. INT'L L.J. 191, 198-201 (1970); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962); Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381, 383-410 (1980). Other writers have endeavored to discuss political crime in the general context of criminal culpability for ideologically motivated offenses under domestic law. *See, e.g.*, S. SCHAFER, *THE POLITICAL CRIMINAL* (1974); Lerner, *Political Offenders*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (1933); Ingraham & Tokoro, *Political Crime in the United States and Japan: A Comparative Study*, 4 ISSUES IN CRIMINOLOGY 145, 145-48 (1969); Friedman, *Criminal Responsibility and the Political Offender*, 24 AM. U.L. REV. 797 (1975); Ferrari, *Political Crime*, 20 COLUM. L. REV. 308, 308-16 (1920). As for the question of what constitutes a "political trial" to those concerned with the sending of international trial observers, *see* Martin-Archard, *Political Trials and Observers*, 6 INT'L COMM'N JUR. REV. 24, 24-31 (1971). Protocol 1 to the Geneva Convention of August 12, 1949, gives the representatives of the protecting power the right to attend proceedings in which prisoner of war status is adjudicated, "unless, exceptionally, the proceedings are held *in camera* in the interest of State security." Protocol 1 to the Geneva Convention of August 12, 1949, *opened for signature* June 10, 1977, art. 45(2), 1 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 115, 144 (1978); *see also* Geneva Convention of August 12, 1949, 75 U.N.T.S. 135 (1950). For a broader, but thorough discussion of the definition of "political prisoner" as that term is com-

fenses against the state, such as treason,¹⁷³ are inherently "political."¹⁷⁴ There are other cases in which the defendant may desire to make a political statement, either in committing the crime itself or in mounting a trial defense.¹⁷⁵ There is a third kind of case in which the government may use a trial to make a political point of its own.¹⁷⁶ There are also cases in which two or more of these factors may coincide.¹⁷⁷ For example, both the government and the defendant may seek to raise different political issues in the same proceeding.

Rather than attempt to define what constitutes a "political" trial, most embassies and organizations send observers when the proceedings will generate sufficient international concern to justify observation. The South African inquest regarding the death of Stephen Biko certainly justified international concern, whether or not it was a strictly political trial.¹⁷⁸ Several governments and organizations sent observers to the inquest.

These broad criteria may explain the observation of trials that are only arguably political in nature, but they do not help organizations

monly used in the terminology of international human rights, see Forsythe, *Political Prisoners: The Law and Politics of Protection*, 9 VAND. J. TRANSNAT'L L. 295, 296-300 (1976).

¹⁷³ E.g., the sedition trial in Angola attended by an International Commission of Jurists observer in 1960 and the "Aspida Trial" in which army officers were accused of treason in Greece during 1969, to which Amnesty International sent an observer. See note 24 *supra*; see also Gardiner, *The South African Treason Trial*, 1 J. INT'L COMM'N JUR. 43 (1957).

¹⁷⁴ In a Spanish trial observed by a Swiss lawyer sent by the International Federation of Human Rights, the defendants were charged with the printing and distribution of political leaflets, as well as possession of a crude explosive device. E. Ziegler-Muller, *Le procès des sept syndicalistes Basques devant le Tribunal d'Ordre Public No. 2 de Madrid*, 19 novembre 1974 (Nov. 20, 1974) (unpublished report to the Fédération Internationale des Droits de l'Homme) [hereinafter cited as Spain — Ziegler-Muller/FIDH (1974)]. In a Turkish trial the issue was whether a political party possessed a right to exist; the I.C.J. sent an observer. Simon, *The Trial of the Türkiye Emekçi Partisi (Turkish Workers Party) Before the Constitutional Court of Turkey*, 24 INT'L COMM'N JUR. REV. 53 (1980) [hereinafter cited as Turkey — Simon/ICJ (1980)].

¹⁷⁵ Defendants were charged with bank robbery and murder; all were members of an opposition party. C. Grobet, *Le procès de membres du M.I.L. devant le Tribunal Militaire de Barcelone*, 8 janvier 1974 (Jan. 9, 1974) (unpublished report to the International Commission of Jurists) [hereinafter cited as Spain — Grobet/ICJ (1974)].

¹⁷⁶ In 1977 the International League for Human Rights sent an American lawyer to the Breytenbach and ANC trials in South Africa, which the observer concluded were "show trials" "designed to show the government's continued firmness." M. Garbus, *Recent Political Trials in South Africa* 5 (July 1977) (unpublished report to the International League for Human Rights) [hereinafter cited as S. Africa — Garbus/ILHR (1977)].

¹⁷⁷ Former Pakistani President Ali Bhutto was charged with a politically motivated murder, but the government's purpose in bringing him to trial was equally political; that is, to prove the corruptness of the previous regime. See Pakistan — Williams/ICJ (1978), *supra* note 158, at 4.

¹⁷⁸ See L. Pollack, *The Inquest into the Death of Stephen Bantu Biko: A Report to the Lawyers' Committee for Civil Rights Under Law* (Feb. 24, 1978) (unpublished report) [hereinafter cited as S. Africa — Pollack (1978)]; see also D. Napley, *Stephen Biko Inquest* (Dec. 8, 1977) (unpublished memorandum).

select trials or guide commentators and courts in determining whether observation is justified. Since there are no coherent guidelines for choosing between trials, embassies and nongovernmental organizations exercise considerable discretion. Frequently, international media coverage of a particular trial may generate pressure to attend.¹⁷⁹ Sometimes a private organization already has developed considerable expertise and interest in the situation which gives rise to the trial.¹⁸⁰ Because observer missions are expensive, some organizations are influenced by the relative costs of different missions or by the possibility of raising funds to attend a specific trial. Without prejudging the fairness of the trial, an organization may send an observer when a special court for political offenses is established.¹⁸¹ Organizations are also influenced by the stature of the person on trial,¹⁸² by the desire to investigate charges that the defendants confessed under torture,¹⁸³ by the use of retroactive or repressive laws as the basis for prosecution,¹⁸⁴ by concern about the general state of human rights in the country, as represented by a particular trial,¹⁸⁵ by the historical significance of the trial itself as with the Eichmann trial,¹⁸⁶ by a government invitation to attend the trial,¹⁸⁷ or by anticipated procedural irregularities, including a bi-

¹⁷⁹ See, e.g., *ICJ News*, 35 BULL. INT'L COMM'N JUR. 38 (1968).

¹⁸⁰ Certainly, the International Commission of Jurists has maintained a steady scrutiny of trials in South Africa. The ICJ has sent 26 observer missions to South Africa over a 25 year period. See, e.g., Gardiner, *The South African Treason Trial*, 1 J. INT'L COMM'N JUR. 43 (1957); *The South African Treason Trial: Second Phase*, 8 BULL. INT'L COMM'N JUR. 37 (1964); R. Falk, *Observer's Report on the State v. Tuhadelini and Others*, in *EROSION OF THE RULE OF LAW IN SOUTH AFRICA* (Int'l Comm'n Jur. ed. 1968); *I.C.J. Sends Observers to Pretoria Trials*, Int'l Comm'n Jur., Press Release (Jan. 14, 1974) [hereinafter cited as *S. Africa — MacDermot/ICJ* (1974)]; note 24 *supra*.

¹⁸¹ See, e.g., AMNESTY INTERNATIONAL, *TUNISIA IMPRISONMENT OF TRADE UNIONISTS* IN 1978 (1979).

¹⁸² See, e.g., C. Sheppard, *REPORT ON THE TRIAL OF ANANDA MARGA LEADER PRABHAT RAINJAN SARKAR IN PATNA, INDIA* 1-2 (1976) (religious leader); W. Hassemer, *Report on Trial Observation in Tunis*, 12-15 June 1977, at 2 (July 7, 1977) (unpublished report to Amnesty International and the International League of Human Rights) (opposition leaders) [hereinafter cited as *Tunisia — Hassemer/AI/ILHR* (1977)]; C. Morand, *Report on the Trial of Mr. Breytenbach*, 21-26 November 1975, at 1 (Dec. 16, 1975) (unpublished report to the International Commission of Jurists) (one of the most prestigious Afrikaaner poets) [hereinafter cited as *S. Africa — Morand/ICJ* (1975)].

¹⁸³ See, e.g., Amnesty International, *AI Concerns in Togo*, at 1 (July 1980) (mimeo).

¹⁸⁴ See, e.g., *The Ceylon Coup D'Etat Trial*, 15 BULL. INT'L COMM'N JUR. 11 (1963).

¹⁸⁵ See, e.g., *A Political Trial in Portugal*, 15 BULL. INT'L COMM'N JUR. 50 (1963); Y. Terlingen, *Interim Report on a Mission to Pakistan* 23 April-12 May 1976 (June 2, 1976) (unpublished report to Amnesty International).

¹⁸⁶ See, e.g., Papadatos, *The Eichmann Trial*, 14 BULL. INT'L COMM'N JUR. 13, 19 (1962).

¹⁸⁷ See, e.g., EQUATORIAL GUINEA — TRIAL OF MACIAS (1979), *supra* note 32 at 1; Dominican Republic — Trujillo (1961), *supra* note 71; Angola — Lockwood (1977), *infra* note 210; International Commission of Jurists, Press Release (Jan. 5, 1971) (concerning an observer mission to a trial in the Cameroons); P. Nöll, *Rapport sur le procès devant la Cour Martiale a*

ased or politically controlled judiciary, intimidated defense attorneys, vague laws, pretrial detention incommunicado, and so on.¹⁸⁸

Trial observation has its limits as a method for preventing human rights violations. Some of the worst human rights violations occur in countries where there are no trials but merely summary arrests followed by imprisonment or execution.¹⁸⁹ In some countries there are virtually no proceedings to observe. For example, in Argentina, legal arguments are written but the defendants do not appear in court and may be kept unaware of the evidence against them. Military trials have been conducted in secret; people have disappeared and been killed without trial.¹⁹⁰ In Chad there have been no trials since the outbreak of fighting in 1979.¹⁹¹ In Ethiopia there has been only one trial in the last two years; the trial was closed and the verdict was announced at the same time as the execution. Many other people have disappeared or been killed.¹⁹² Preventive detention laws, as in Grenada,¹⁹³ Malawi,¹⁹⁴ Malaysia,¹⁹⁵ and Swaziland,¹⁹⁶ do not allow public proceedings and thus afford no opportunity for observers. In several countries — for example, Haiti,¹⁹⁷ the Philippines,¹⁹⁸ Singapore,¹⁹⁹ and the Yemen Arab Republic²⁰⁰ — there are political detainees, but the government often does not bother to hold trials.

Tananarive, Madagascar, at 1 (Apr. 14, 1975) (Report on the Lawsuit in front of the Martial Court of Tananarive, Madagascar) (unpublished report to the International Commission of Jurists) [hereinafter cited as Madagascar — Noll/ICJ (1975)].

¹⁸⁸ Association Internationale des Juristes Démocrates, *Le procès des intellectuels Irianiens* (Dec. 30, 1965) [hereinafter cited as Iran — Ducreaux/AIJD (1965)].

¹⁸⁹ During the reign of Bokassa in the Central Africa Republic there were only a few closed trials; the results were announced after the fact. *See generally* U.S. Department of State, Country Reports on Human Rights Practices for 1979 to U.S. Senate Comm. on Foreign Relations and the House Comm. on Foreign Affairs, 96th Cong. 2d Sess. 39 (1980) [hereinafter cited as 1979 U.S. Human Rights Report].

¹⁹⁰ *See generally* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE MISSION OF LAWYERS TO ARGENTINA, APRIL 1-7, 1979 (1979) [hereinafter cited as ARGENTINA — N.Y. BAR REPORT].

¹⁹¹ AI, ANNUAL REPORT 1980, at 38 (1980).

¹⁹² *See* U.S. Department of State, *Report on Human Rights Practices in Countries Receiving U.S. Aid, to U.S. Senate Comm. on Foreign Relations and the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 54 (1979) [hereinafter cited as 1979 U.S. Human Rights Report]; *see generally* 1980 U.S. Human Rights Report, *supra* note 189, at 67; AI, HUMAN RIGHTS VIOLATIONS IN ETHIOPIA (1978).

¹⁹³ AI, AMNESTY INTERNATIONAL REPORT 1981, at 157-61 (1981); AI, AMNESTY INTERNATIONAL REPORT 1980, at 138 (1980).

¹⁹⁴ AI, AMNESTY INTERNATIONAL REPORT 1980, at 58-59 (1980).

¹⁹⁵ 1979 U.S. Human Rights Report, *supra* note 189, at 386-87.

¹⁹⁶ *Id.* at 174.

¹⁹⁷ *Id.* at 271-72.

¹⁹⁸ *Id.* at 398.

¹⁹⁹ *Id.* at 409-11.

²⁰⁰ *Id.* at 655.

Sending an observer is also relatively ineffectual in cases where flagrant violations, such as torture, occur before trial and cannot be rectified even if the accused is acquitted.²⁰¹ Nevertheless, a trial observer can publicize pretrial human rights violations. The more basic problem, however, is that trials represent a respect for human rights that is missing in many countries. In those nations that hold trials and attempt to demonstrate their fairness, observers have a useful function. They can pierce the facade of fairness and help assure that a government's promise of justice is fulfilled.

A government may send trial observers primarily for its own informational purposes.²⁰² Trials, especially "political" trials, often bring into clear relief competing forces which governments and international organizations should understand in order to pursue sensible diplomacy. Partly for this reason, embassies send observers to important trials instead of relying on uneven, insufficient media reports. Embassies may also wish to communicate with or at least learn about oppressed groups in other countries and trials may provide exposure to such groups. Sending an official also demonstrates concern for fairness and for the issues involved in the proceedings.²⁰³

In some respects embassies may feel more reluctant to send observers than private organizations. First, embassy personnel may be faced with heavy time demands;²⁰⁴ personally observing a trial may be a relatively inefficient means of collecting information. Second, an official observer might be inappropriate in the context of very

²⁰¹ S. Suckow, Observer Report on Trial Held Before a Military Court in Kenitra, Morocco, January 15-18, 1974, at 2 (unpublished report to the International Commission of Jurists) [hereinafter cited as Morocco — Suckow/ICJ (1974)]. A further problem in sending a trial observer is that the government may publicize the mission as an international seal of approval not only for the trial, but for their entire human rights record. After Amnesty International sent an observer to a trial in Togo, the government took out half-page advertisements in the New York Times and Washington Post claiming that the AI observer had found no human rights problems in Togo. *America Has Right to Truth About Togo*, New York Times, July 16, 1980, at A-12. AI then issued a more complete indication of its substantial human rights concerns in Togo. See generally AI, AMNESTY INTERNATIONAL REPORT 1980, at 84-86 (1980).

²⁰² In 1950 the U.S. embassy sent an attache to the London trial of Klaus Fuchs for transmitting atomic secrets to the Soviet Union. *Fuchs Sentenced to 14 Years*, New York Times, March 2, 1950, at 14, col. 3.

²⁰³ See generally C. Runyon, Some Perspectives on the Human Rights Provisions of the Foreign Aid Act and Similar Legislation 15 (unpublished memorandum 1977); see also International League for Human Rights, Report of the Conference on Implementing a Human Rights Commitment in United States Foreign Policy 35 (1977); *Human Rights, Hearings before the Subcomm. on For. Assistance, Sen. Comm. on Foreign Relations*, 95th Cong., 1st Sess. 10 (testimony of David Weissbrodt), 39 (testimony of Edward Snyder) (1977).

²⁰⁴ See, e.g., U.S. Dep't of State, Providing Consular Services to the American Public Abroad 1-2 (July 14, 1977); U.S. Dep't of State, The Drug Problem: Americans Abroad (Aug. 1977).

delicate bilateral relations. A private organization might be able to send an observer to the same trial without political repercussions. Unlike governments, nongovernmental organizations do not have to maintain a wide range of political, social, and business relations, and may be concerned solely with one problem, such as human rights. Moreover, organizations such as Amnesty International and the International Commission of Jurists are known for their impartiality and may select the nationality of their observers so as to preserve the appearance of independence. In contrast; an embassy usually sends its own citizens, who come clothed with their national stereotypes and bilateral relations.

D. *Selection of the Observer*

Qualified, impartial, and prestigious observers add the weight of their personal reputations to a mission, independent of the sponsoring organization. Most observers are distinguished attorneys in their own countries,²⁰⁵ and volunteer out of a sense of commitment to human rights, an interest in other countries, or a desire to help the sponsoring organization or government. Sometimes a government or organization sends a permanent employee as an observer.²⁰⁶

The International Institute of Human Rights and some observers have sometimes suggested the creation of an international panel of observers.²⁰⁷ While this might provide experienced observers, private

²⁰⁵ Military trial observers are an exception in this regard; they lack the personal prestige which is the norm for jurists sent by nongovernmental organizations to trials of human rights concern. By and large, military observers are young JAG corps lawyers who are assigned to attend numerous routine trials during their foreign tour of duty. They do, however, carry the status of their country with them; to highlight this, they normally dress in military uniform at trial. While military trial observers will initially know little of the language and legal traditions of the country in which they are stationed, they are likely to develop considerable expertise as they may attend as many as several hundred trials in the course of a tour of duty. They also may help retain counsel for accused service personnel so that they will be familiar with defense counsel as well as many prosecutors and judges. Williams, *supra* note 5, at 21–22. With little personal prestige and high local visibility, military attorney-observers cannot influence the proceedings as greatly as respected foreign jurists in politically-charged trials.

²⁰⁶ In trials of exceptional worldwide interest, nongovernmental organizations may send their own Secretary-General to underline the importance of the trial. *See, e.g.,* S. Africa — MacDermot/ICJ (1974), *supra* note 180.

²⁰⁷ Observer Aronstein argues in his report that there ought to be a permanent trial observer bureau which would be more effective than the somewhat haphazard present efforts. C. Aronstein, Observations judiciaires sur le procès de Julio Millan Hernandez à Madrid du 10 au 15 février 1972 (Feb. 12, 1972) (Judicial observations on the Trial of Julio Millan Hernandez at Madrid from February 10–15, 1972) (unpublished report to the Belgian League for the Defense of Human Rights) [hereinafter cited as Spain — Aronstein/BLDHR (1972)]; *see also* Letter from Niall MacDermot, Secretary-General of the International Commission of Jurists, to Joe Nordmann, International Association of Democratic Lawyers (March 27, 1973). In August 1981 the Armand Hammer Conference, “Peace and Human

organizations have already established informal resources and tend to rely upon observers who have previously served on missions.²⁰⁸ Furthermore, a permanent panel of observers would frustrate organizations which prefer to use their own members as observers. These organizations can trust their members to follow instructions and act in accordance with the organizations' purposes.²⁰⁹ Also, there are so many factors to be considered in selecting an observer for a particular case that no panel would be sufficiently large to serve all needs. A panel would only narrow the range of choices and decrease flexibility.

The factors to be considered in the selection of an observer include prestige, language abilities, knowledge of the legal system where the trial will be held, knowledge of international human rights standards, availability on short notice, trustworthiness, nationality, ability to enter the country of trial without a visa, and occasionally even willingness to take some personal risk. The selection of an observer may also be influenced by the purpose of the sending organization. If the primary purpose is to obtain an accurate report, familiarity with the language,²¹⁰ legal system,²¹¹ and background of

Rights-Human Rights and Peace" in Aix-en-Provence, resurrected this concept of an international or U.N. trial observer corps. Indeed, there was some brave and unrealistic discussion of appointing a corps of observers to serve as the "casques bleus des droits de l'homme". Armand Hammer Conference, *Projet de règles relatives au corps international d'observateurs judiciaires* (mimeographed memorandum, July 28, 1981).

²⁰⁸ Several such observers are internationally known European jurists whom non-governmental organizations have often called upon to attend foreign trials. Representative among them are the following:

Edmond Martin-Achard (Switzerland); Claude-Serge Aronstein (Belgium); Louis Blom-Cooper (United Kingdom); Christian Grobet (Switzerland); Niall MacDermot (United Kingdom); and Kurt Madlener (West Germany).

²⁰⁹ See, e.g., J. Dowd & P. Stein, *Report on the Trial of Hariman Siregar* (Dec. 23, 1974) (unpublished report to the International Commission of Jurists) [hereinafter cited as *Indonesia — Dowd/ICJ* (1974)] (two members of the Australian national section of the ICJ selected as observers); Interview with Michael Williams in London (June 1978) (British jurist who was AI British section co-ordinator for the Middle East selected as observer for an Egyptian trial in 1978).

²¹⁰ Certainly, it is very difficult for a common law attorney who lacks knowledge of Portuguese, the Portuguese legal system, or even civil law procedure, to observe a trial adequately in Angola. See Lockwood, *Report on the Trial of the Mercenaries: Luanda, Angola June 1976*, 7 MANITOBA L.J. 183, 197 (1977) [hereinafter cited as *Angola — Lockwood* (1977)]. Nevertheless, Lord Russell appeared to have no difficulty in understanding the French procedures applied in the Dreyfus case. Dreyfus trial report, *supra* note 11, at 319-20.

²¹¹ The International Commission of Jurists sent a German legal scholar to Thailand. M. Kopp, *Trial of 18 Thammasat University Students in Bangkok* (Aug. 4, 1977) (unofficial translation of an unpublished report to the International Commission of Jurists) [hereinafter cited as *Thailand — Kopp/ICJ* (1977)]. Similarly, the I.C.J. selected as an observer for a Spanish trial Kurt Madlener, Professor of Spanish Penal Law at the Max-Planck Institute for

the proceedings²¹² is most important. Unfortunately, such observers might have too many ties to the receiving nation to preserve an air of impartiality.

If the sending organization or government wants to encourage fairness, it might select an observer with very high prestige in the country of trial.²¹³ But even then the observer might lack expertise in the language or legal system, and may lack status in the larger international community.²¹⁴

In order to avoid some of these problems, potential observers may sometimes be recruited from nations with the same language and legal tradition as the place where the trial will be held. For example, if the trial is in Morocco or Tunisia, an experienced French lawyer might be an excellent choice from a technical standpoint. But, on one hand, the organization must consider whether sending a French observer might be perceived in the former colony as a form of neo-colonialism.²¹⁵ On the other hand, lawyers from a former colonial power may be respected as experts who know how the law ought to be applied. The judge and prosecutor may feel that they are being tested upon their adherence to "correct" principles of law. Many of

Penal Law in Freiburg, West Germany. *ICJ Observer at the Trial of Carabanchel Ten*, International Commission of Jurists, Press Release (Jan. 22, 1974).

Almost all observers have been lawyers — both because attorneys will ordinarily understand the proceedings better than non-lawyers and because lawyer-observers will usually be more prestigious in the courtroom setting. Embassies may not, however, have a lawyer on staff for a trial observation, but may prefer to send a non-lawyer as a second-best alternative, rather than send no one. For example, the U.S. embassy in Guyana sent a political officer to an important trial, because no lawyer was available and because the political officer had considerable experience in attending trials of interest to the U.S.

²¹² The I.C.J. decided to send a Dutch lawyer to a trial in South Africa, which seemed appropriate given the Dutch ancestry of the dominant white minority, the similarity of the Dutch and Afrikaans languages, and given the important contacts which the observer was able to make through the influential Dutch Embassy in South Africa. See L. Velleman, Report on the Second Breytenbach Trial (June 1977) (unpublished report to the International Commission of Jurists) [hereinafter cited as S. Africa — Velleman/ICJ (1977)].

²¹³ In one case the I.C.J. selected an observer of such prestige that his selection received considerable publicity in Czechoslovakia; the Czech authorities released the defendants and no trial was held. See MacDermot, *Political Prisoners and Trials* 6 INT'L COMM'N JUR. REV. 2, 3 (1971).

²¹⁴ Dean Larson of Duke University was selected particularly for his prestige in the United States. See *Sentences in South Africa Case Called 'Monstrous Travesty'*, Lutheran World Federation, Press Release No. 4/68, at 2 (Feb. 12, 1968).

²¹⁵ Amnesty International has published some of its early considerations in selecting an observer: "The choice of the delegate (observer) is also vital since a Government may think, for example, that it has reason to distrust the bona fides of a delegate from what may be the former colonial power or from a country on opposite sides in the 'Cold War'. The I.S. is particularly anxious to make more use of observers and delegates from countries other than the United Kingdom. One of the problems, of course, is that it is frequently essential to send an observer at very short notice indeed and it is difficult to make the necessary arrangements with comparatively distant capitals." AI, ANNUAL REPORT 1965-66, at 9 (1966).

the lawyers and judges in Morocco were trained in France and have considerable respect for the leaders of the French bar.²¹⁶ If anti-colonialist sentiments are prevalent, however, the organization might send a Tunisian attorney to a Moroccan trial.²¹⁷ Similar considerations often apply to British observers.²¹⁸

The organization or embassy might consider sending its own staff members to observe a trial. This approach has both advantages and disadvantages. Staff members will almost certainly be well informed of the events surrounding the trial and the reasons for sending an observer.²¹⁹ Indeed, the staff member may decide that the trial merits observation. A staff observer will also be reliable in preparing a report. Unfortunately, staff members will generally be less distinguished than outsiders whom the embassy or the organization might be able to recruit. Although the sponsoring organization or nation may lend status to the observer,²²⁰ a better known individual

²¹⁶ See F. Jemoli, *Rapport de Mission de l'Observateur au Procès de Rabat au Maroc* (July 27, 1976) (unpublished report to Amnesty International) [hereinafter cited as Morocco — Jemoli/AI (1976)]; L. Hincker, *Rapport de missions au Maroc* (undated) (unpublished report to Amnesty International) [hereinafter cited as Morocco — Hincker/FIDH]; Y. Baudelot, *Procès des "Frontistes"* (Jan. 27, 1977) (unpublished report to the Association Internationale de Juristes Démocrates). Alternatively, an attorney observer from Belgium or Luxembourg might avoid both the anti-colonialism problem for the French and also the proximity problem of the Tunisians. See, e.g., J. Hoss, *Rapport de la mission effectuée au Maroc du 28 Avril au 31 Mai 1976* (undated) (unpublished report to Amnesty International) (observer from Luxembourg).

²¹⁷ The I.C.J. successfully sent a distinguished former Chairman of the Tunis Bar to a Moroccan trial. See *ICJ Nominates an Observer to Marrakesh Trial*, International Commission of Jurists, Press Release (June 15, 1971). But on another occasion observers from Algeria were criticized severely in the Moroccan press for observing a Moroccan trial. See H. Woesner, *The Political Trial of Kenitra*, June–July 1973, at 4–5 (July 26, 1973) (unpublished report to Amnesty International) [hereinafter cited as Morocco — Woesner/AI/ICJ (1973)]. There was no similar comment in the press, however, critical of the Amnesty International observer from Germany. *Id.* at 5.

²¹⁸ The British observer in a South African trial described the numerous similarities between the procedures of the two legal systems. See A. Cripps, *Report on the Trial in Pretoria of Sathasivas Cooper*, 19–29 August 1975, at 2 (Sep. 3, 1975) (unpublished report to the International Commission of Jurists). There are also considerable similarities between British and Israeli criminal procedures. See Israel — Mortimer/AI (1975), *supra* note 149, at 4.

²¹⁹ See, e.g., *Equatorial Guinea — Trial of Macias* (1979), *supra* note 32, at iii:

"The International Commission of Jurists was fortunate in having available its legal officer for Spanish-speaking countries, Dr. Alejandro Artucio, a Uruguayan lawyer. Dr. Artucio is familiar with the Spanish system of law under which the accused were tried, and in his work at the International Commission of Jurists he had been following events in Equatorial Guinea for some years. Accordingly, he had a good knowledge of the circumstances prevailing in the country during the eleven years of Macias' rule."

²²⁰ The prestige of the sending organization and its observer may result in deferential treatment for the observer. While a lawyer observing for the National Lawyers Guild was excluded from the courtroom with other spectators during the testimony of the security police, a British staff lawyer for AI was permitted to remain in the courtroom for identical

will have more impact upon the trial and her report will receive greater respect.

While it may seem most convenient to send an observer from the country where the trial is to be held, Amnesty International and other organizations have express rules against this practice.²²¹ The International Commission of Jurists, the International Association of Democratic Lawyers, and others also normally send foreign observers.²²² There are several practical reasons for this policy. While a local lawyer will probably be informed of the surrounding circumstances, and will have the necessary technical skills, he will not bring the fresh perspective of the foreign observer.²²³ The local lawyer may judge the fairness of the proceedings according to legal standards of the country. Also, the local attorney may have or appear to have a political bias which will tend to make his findings less credible. Furthermore, the local lawyer may have less success in handling the technical aspects of the mission.²²⁴ Because of the novelty of the mission, a foreign lawyer will ordinarily be able to attend political trials and interview officials, while a native may not have sufficient prestige.²²⁵ The foreign lawyer will have a more formidable presence in the courtroom and may influence the judge and prosecutor to be fair,²²⁶ while the local lawyer may be less effective.

testimony. Compare Israel — Mortimer (1975), *supra* note 218, with Goodman, *Guild Report: On the Trial of Sami Esmail*, GUILD NOTES, July 1978, at 12.

²²¹ Organizations are often quite sensitive to the appearance of bias which might arise from nationality. For a trial to be held in the Ivory Coast, Amnesty International selected a French-speaking Swiss observer and not a French lawyer, because the principal defendant was French. See Amnesty International, Mission Report on Ivory Coast Trial, July 1974 (unpublished report) [hereinafter cited as Ivory Coast — Picard/AI]. Other organizations may be less meticulous about such considerations. See, e.g., G. Vournas, *The Trial of the Fifteen in Greece*, March 17, 1972 (April 12, 1972) (unpublished report to the International League for the Rights of Man) (Greek-American lawyer sent to observe the trial of a fellow Greek-American lawyer) [hereinafter cited as Greece — Vournas/ILRM (1972)].

²²² See note 24 *supra*.

²²³ The foreign lawyer may notice subtle methods by which an accused is unfairly treated in or out of court. The arrangement of a courtroom, for instance, is a matter which local attorneys take for granted; to a foreign observer it may appear that the positioning of the participants is prejudicial to the defendant. See, e.g., Spain — Aronstein/BLDHR (1972), *supra* note 207, at 5. The observer, however, should also be able to consult with local lawyers as to any irregularities of local procedure which a newcomer might miss. See, e.g., Bulgaria — Spetter, *supra* note 68, at 3-8.

²²⁴ On at least one occasion the Tunisian government refused to admit eight observers from neighboring Arab nations into the country, but permitted the German observer representing Amnesty International to attend the trial. The independence, uniqueness, and impartiality of the German observer made his presence acceptable to the Tunisian government. See Tunisia — Hassemer/AI/ILHR (1977), *supra* note 182, at 3.

²²⁵ See, e.g., Iran — Albala *et al.*/AIJD (Dec. 1978), *supra* note 14, at 10.

²²⁶ There are many ways in which the observer's presence may influence courts to afford greater procedural and substantive fairness toward the accused. Positive impacts which ob-

Sex and race are two other factors which may bear on the choice of observer. In many countries women have a low status; hence, an organization might consider carefully whether a woman should serve as a trial observer. But even in countries where women have a low status and men dominate the legal profession, a female trial observer might be so unusual as to increase her impact on the trial.²²⁷

Similarly, the race of an observer may be a factor in some instances. For example, Amnesty International sent a Bangladesh lawyer to North Dakota for the trial of a Native American leader.²²⁸ This observer gave Native Americans an opportunity to present their problems to a potentially sympathetic lawyer from the Third World. A Caucasian lawyer might have been less effective in gaining access to information. In addition, the Bangladesh lawyer was so unusual in North Dakota that he was able to make the judge and prosecutor very aware of his presence.²²⁹ It would probably have been a mistake, however, to send the same Bangladesh lawyer to the Guyana trial of a political activist who was accused of killing a black police officer for racial and political motives.²³⁰ A Bangladesh lawyer of the same race as the defendant might not have appeared sufficiently impartial in such a racially charged situation.

So many factors bear on the selection of an observer that it is almost impossible to prescribe them in advance.²³¹ Private organiza-

servers have noted include the following (a) prompting the court to allow defense counsel greater latitude in presenting favorable evidence, *see* C. Thornberry, *State v. Taapoli and Kashea*: Report to Amnesty International and the Lawyer's Committee for Civil Rights Under Law on Trial Held 17-21 June 1974, at 4 (unpublished report) [hereinafter cited as *S. Africa — Thornberry/AI/LCCRUL (1974)*]; (b) increasing the attention which judges paid to arguments of the defense, *see* T. Kellock, *Report on Amnesty International Observer's Visit to Malawi*, Sept. 1968, at 1 (unpublished report) [hereinafter cited as *Malawi — Kellock/AI (1968)*]; (c) enlarging the scope of otherwise perfunctory trials, *see, e.g.*, *S. Korea — Sanguinetti/ICJ (1972)*, *supra* note 170 at 6; and (d) better than expected results in the form of lighter sentences for the defendants, *see* *Spain — Aronstein/BLDHR (1972)*, *supra* note 207 at 12; *South West Africa — Larson/LWF (1968)*, *supra* note 164.

²²⁷ *See, e.g.*, B. Assheton, *Report on Visit to Iran*, December 1968-January 1969 (Mar. 17, 1969) (unpublished report to Amnesty International) [hereinafter cited as *Iran — Assheton/AI (1968)*] (British woman attended trial in Iran).

²²⁸ S. Bari, *Report on the Case of U.S. v. Peltier* (unpublished report to Amnesty International) (1978) [hereinafter cited as *United States — Bari/AI (1977)*].

²²⁹ Conversely, a U.S. observer and his companion were the only whites other than the judge in a South African courtroom; they obviously stood out. *See* *S. Africa — Grabus/ILHR (1977)*, *supra* note 176, at 6. In another circumstance a black U.S. judge was selected to observe a Namibian trial. *See* W. Booth, *Report to the International Commission of Jurists on Windhoek, Namibia Trial* (March 1972) (unpublished mimeo).

²³⁰ *See generally* D. Weissbrodt, *The Third Trial of Arnold Rampersaud* (Jan. 27, 1978) (unpublished report to Amnesty International) [hereinafter cited as *Guyana — Rampersaud*].

²³¹ The religion of the observer may be a significant consideration; for instance, the I.C.J. selected a Christian observer for an Indonesian trial in which the judge, prosecutor, and defendant were all Christians, even though only 7% of the Indonesian population was Christian.

tions normally take into account the many factors discussed above, but frequently cannot find an ideal observer and select the best person available.

IV. THE PROCESS OF TRIAL OBSERVATION

A. *Timing and Duration of Observer Missions*

It is often difficult to know when an ordinary trial will begin. In political cases, it is even harder to know when an organization ought to send an observer, often from a great distance.²³² In some countries, such as the Soviet Union, the trial intentionally may be set in an inaccessible location and at a time that is either not indicated in advance or announced only at the last minute.²³³ On one occasion an Amnesty International observer traveled from England to South Africa only to hear a brief proceeding at which the defense asked for and received an adjournment.²³⁴ Another observer traveled half way around the world to find that the trial had already occurred.²³⁵ Obtaining reliable information about the precise date and location of a trial can be a major problem.

Organizations ordinarily keep in touch with the defense attorney, who, while usually well informed, may not be able to predict the actions of the court or prosecutor. A hostile prosecutor may suddenly seek an adjournment when the observer arrives, or may stall the pro-

See Indonesia — Dowd/ICJ (1974), *supra* note 209, at 2. Nationality of the observer is often another important consideration. For example, because of the economic and political connection between the U.S. and South Africa, the linguistic similarities, and the related legal systems, a U.S. observer is appropriate for South African trials. *See, e.g.*, Arnold, *Fighting South Africa's Infernal Security Laws*, 8 JURIS DOCTOR 49, 50 (No. 5, 1978) (Dean Louis Pollack of Pennsylvania sent to observe the Stephen Biko inquest).

²³² *See, e.g.*, ICJ *Observers for Political Trial in Athens*, International Commission of Jurists, Press Release, March 26, 1970.

²³³ *See* note 37 *supra*; *see also* J. Lockyer, Report on the Case of Leonard Peltier 3 (Nov. 1976) (unpublished report to Amnesty International).

²³⁴ C. Thornberry, *State v. Taapoli and Kashea*: Report to Amnesty International and the Lawyer's Committee for Civil Rights Under Law on Trial Held 17-21 June 1974, at 2 (unpublished report). Even if the observer is not able to attend the trial, it may still be worth sending such a mission, because the observer may be able to obtain sufficient information about the proceedings from family members who have attended, from defense attorneys, and from interviews with other trial participants to render a report and even to influence any later proceedings. *Cf.* Amnesty International, *Trials of Members of the Committee for the Defense of the Unjustly Prosecuted in Czechoslovakia*, 22-23 October 1979 (Jan. 15, 1980) [hereinafter cited as *Czechoslovakia* — Goldman/AI (1980)] (observer not admitted, but performed useful research anyway); *Spain*, 15 INT'L COMM. JUR. REV. 25, 29-32 (1975) (same).

²³⁵ Letter from John Thorne to Jim Reif (Jan. 22, 1974). The observer naively expected the Iranian consulate in San Francisco to notify him of the starting date of the trial. As might be expected, the consulate never notified the observer. The observer was notified by a friend in Iran on the day of the trial's commencement. He left the next day, but arrived too late.

ceedings to render her visit less effective.²³⁶ The organization must carefully monitor the pretrial process and make extremely difficult predictions about when the trial will actually occur.

Embassies have several advantages over private organizations in knowing when to send an observer and in being able to send an observer at the last moment. Because of their proximity, embassies are usually able to monitor the proceedings. If a government wishes to send an observer from outside the country,²³⁷ its embassy can follow developments and can make last-minute arrangements for accommodations. More commonly, a member of the embassy staff can attend the trial at relatively short notice and with minimal inconvenience.

Private organizations ordinarily rely on long distance telephone and local contacts to keep informed of trial dates. In some situations friendly embassies have discreetly assisted by passing along information to nongovernmental organizations.²³⁸

The problem of timing is exacerbated by the limited availability of trial observers. Most outside observers cannot spend more than a week or two on missions since they ordinarily have busy professional lives.²³⁹ Political trials may take more than a week or two.²⁴⁰ The sending organization therefore must anticipate the most important time to be present.²⁴¹ Ordinarily, the impact of the observer is great-

²³⁶ See, e.g., J. Archer, Report on Visit to South Africa (1975), *supra* note 76, at 2; *Observer Mission to South Africa*, 3 INT'L COMM. JUR. REV. 58 (1969).

²³⁷ *Defendant in Seoul Trial Denies He Incited Students*, N.Y. Times, Aug. 26, 1980, at 3, col. 1 (observer sent from State Department Legal Advisor's Office to trial of Kim Dae Jung).

²³⁸ Another possible approach is exemplified by the arrangement the I.C.R.C. made with Israeli authorities to be informed of any military trials of civilians one week in advance of the date of trial. But the "ICRC took steps to ensure that the period of notification was observed . . . which was not always the case." INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 1978, at 32 (1979).

²³⁹ Aronstein, *Acquittement à Madrid ou le Franquisme Ordinaire*, 62 REVUE NOUVELLE 451 (1975) (mission took four days; the trial lasted one day); W. Booth, Report to the International Commission of Jurists on Windhoek, Namibia Trial 7 (Mar. 1972) (unpublished mimeo) (6 day mission with 5 days attending a much longer trial); Spain — Grobet/ICJ (1974), *supra* note 175; W. Hassemer, Report on Trial Observation in Tunis, 12-15 June 1977, at 4 (July 7, 1977) (unpublished report to Amnesty International and the International League of Human Rights) (4 day mission including trial); Thailand — Kopp/ICJ (1977), *supra* note 211.

²⁴⁰ One I.C.J. observer attended only the first of four hearings in Turkey on February 26, 1980; subsequent hearings were held on March 3, March 18, and April 10. Simon, *The Trial of the Türkiye Emekçi Partisi (Turkish Workers' Party) Before the Constitutional Court of Turkey*, 24 INT'L COMM. JUR. REV. 53, 59-60 (1980).

²⁴¹ Since trials are expected to last a substantial period of time, nongovernmental organizations might consider selecting an observer who is a foreign lawyer temporarily residing near the trial. Not only would this approach make the observer capable of attending more of the trial, but it also saves travel expense. But if the organization is so constrained in selecting a foreign lawyer already in the area, it may not be able to find an observer of the requisite prestige. Also, this approach to selecting an observer is not possible where there might be

est if she is present at the beginning or toward the end of the trial.²⁴² But if the observer wants to obtain a clear picture of the case, she ought to observe the testimony of the prosecution's main witnesses.²⁴³ For long trials of considerable importance the organization may send a single observer several times or designate several observers to attend seriatim.²⁴⁴ Embassies have little problem in sending observers to such trials, except for the temporary diversion of staff from other matters.²⁴⁵

Although it is obviously best to attend the full trial, most observers have had little difficulty in making reliable findings based on brief observation and the materials they are able to collect.²⁴⁶ After meeting the main participants in the trial, seeing the surrounding circumstances, and collecting transcripts of proceedings they could

reprisals against the observer. In recent years Amnesty International has often selected foreign observers already resident in this country for U.S. trials. A Bangladesh lawyer living in Minneapolis was sent by AI to attend the trial of the Indian leader Leonard Peltier in North Dakota; a judge from Iceland was temporarily residing in Los Angeles when she was asked to attend a lengthy trial of a Chicano activist in that city; a lawyer from India was an international human rights scholar at Berkeley when he was asked to attend an appeal hearing in San Francisco. See AI, AMNESTY INTERNATIONAL REPORT 1980, at 361-62 (1980); AI, ANNUAL REPORT 1979, at 176-78 (1979).

²⁴² A Portuguese trial was held for a period of two months, but sessions were conducted only two days a week, on Tuesdays and Fridays. The observer attended the first four days and the final days of the trial. International Association of Democratic Lawyers, Press Release (Feb. 17, 1971). Another observer attended just the beginning of a Lesotho trial but believed that his impact would continue. B. van Niekerk, Report to Amnesty International on Visit to Lesotho (Nov. 13, 1974) (unpublished report to Amnesty International).

²⁴³ Two Australian observers shared their mission responsibilities; the first observer attended the beginning and the end of the Indonesian trial which started in August and continued in a desultory manner until November. The other observer attended a week in the middle of the trial and they prepared a joint report. Indonesia — Dowd/ICJ (1974), *supra* note 209.

²⁴⁴ St. John, *The South African Treason Trial*, 9 BULL. INT'L COMM'N JUR. 21 (1959) [hereinafter cited as S. Africa — St. John/ICJ (1959)]; Hambro, *The South African Treason Trial: Second Phase*, 8 BULL. INT'L COMM'N JUR. 45 (1958); Gardiner, *The South African Treason Trial*, 1 J. INT'L COMM'N JUR. 43 (No. 1, 1957) [hereinafter cited as S. Africa — Gardiner/ICJ (1957)]; *The Yassidiya Trial and Other Recent Developments in Turkey*, 14 BULL. INT'L COMM'N JUR. 25 (1962) (three successive observers to the same trial).

²⁴⁵ The U.S. Embassy in South Africa was able to observe the entire month-long trial of a South African journalist without the sort of hardship which a nongovernmental organization would encounter in sending observers to such a long trial. Letter from Douglas Bennet, Assistant Secretary for Congressional Relations, U.S. Department of State, to Donald Fraser, Chairman of House Subcommittee on International Organizations, Committee on International Relations (Apr. 21, 1978).

²⁴⁶ One I.C.J. observer commented: "The present report is based not only on the undersigned's personal observations made in the course of a relatively brief attendance at the trial in the Patna District Court from 11-18 June 1976, but on many meetings with defense and prosecution counsel, with various other observers, and the examination of hundreds of pages of documents, briefs and transcripts." C. Sheppard, REPORT ON THE TRIAL OF ANANDA MARGA LEADER PRABHAT RAINJAN SARKAR IN PATNA, INDIA 3 (1976) [hereinafter cited as India — Sheppard/ICJ (1976)].

not attend, most observers can sensibly determine whether the proceedings were fair. Of course, the demeanor of the judge and prosecutor might change when the observer is not present, but observers can gather second-hand information to learn of such inconsistencies before preparing their reports.

B. *Funding*

Funding of trial observer missions is important because it reflects on impartiality, dictates the number of trials which may be observed, influences the thoroughness of fact-finding, and bears upon the selection of an observer.

The source of funding for private observers can taint the impartiality of the mission. Groups that regularly sponsor trial observer missions take care to use only those funds obtained from neutral sources. The Amnesty International Secretariat had an annual budget of 1,733,375 pounds in the fiscal year ending April 30, 1980,²⁴⁷ mostly raised through dues and contributions from members. Neither Amnesty International nor the International League for Human Rights accepts funds from governments.²⁴⁸ The League operates on a budget of \$75,000 to \$100,000 drawn from membership contributions, affiliated organizations, foundations, and special fundraising events.²⁴⁹

Most private organizations lack sufficient funds to mount observer missions without specific fundraising efforts for each mission. However, where fundraising is undertaken on a mission-by-mission basis, the source of funds may create an appearance of bias. For example, if during the late 1960's an organization had undertaken to observe a trial in Greece, it might have turned to Greek expatriate groups for some or all of its support. Without such very interested supporters, the organization might not be able to mount the mission at all. Yet if the source of funds for the mission were known, the results could well be suspect.²⁵⁰ This suspicion is unfortunate since

²⁴⁷ See AI, AMNESTY INTERNATIONAL REPORT 1980, at 372 (1980); see generally Note, *The Role of Nongovernmental Organizations in Implementing Human Rights in Latin America*, 7 GA. J. INT'L & COMP. L. 477, 482 (1977); THE INTERNATIONAL COMMISSION OF JURISTS, OBJECTIVES, ORGANIZATION, ACTIVITIES 5 (1972).

²⁴⁸ See AI, AMNESTY INTERNATIONAL REPORT 1980, at 368 (1980); Wiseberg & Scoble, *The International League for Human Rights: The Strategy of a Human Rights NGO*, 7 GA. J. INT'L & COMP. L. 289, 295 n.15 (1977); interview with Maureen Berman, Executive Director of the League, in Geneva (Sep. 5, 1977).

²⁴⁹ Interview with Maureen Berman, Executive Director of the League, in Geneva (Sep. 5, 1977).

²⁵⁰ The National Council of Churches of the U.S.A. gave \$37,500 toward the defense of the accused at the same time that it co-sponsored the observer mission of Dean Arthur Larson to South Africa. *Sentences in South Africa Case Called 'Monstrous Travesty'*, Lutheran World Fed-

bias arising from the source of funding is more a problem of appearance than of reality. Observers rarely know the source of funding for their missions. Moreover, observers are ordinarily of such integrity and independence that neither the source of funding nor an actual bias of the sending organization would influence their conclusions.

While the danger of bias is more imaginary than real, financial considerations may determine how many missions can be undertaken. Hence, effective fundraising is essential. Amnesty International has attempted to allocate resources by establishing a single account for special projects, including missions, conferences, and translations. It has been successful in raising money for this account without tying the contributions to any particular mission. Sometimes organizations seek funds from disinterested sources, such as other human rights organizations, religious bodies, special United Nations funds, foundations, and charities.²⁵¹

Where financially feasible, private organizations and governments should consider sending two observers to trials, if merely to keep each other company on missions to unknown and perhaps threatening countries. Where the surrounding circumstances are particularly unsettled, a team of observers can help protect each other and bring different strengths to the mission.²⁵² Where there are financial constraints, organizations and governments might cooperate by each sending one observer and coordinating their activities.

Although it may be best for observers from several governments and organizations to attend a trial, allowing the observers to share information and keep up morale, there is probably a limit to the optimal number of observers for any trial. For example, at one Tunisian trial there were five observers.²⁵³ In order to husband limited resources and to maximize their impact on important trials, organizations should seek to coordinate their missions as much as possible.²⁵⁴

eration, Press Release No. 4/68, at 3 (Feb. 12, 1968), *supra* note 214. Such an overtly dual financial role should be avoided because it might make the observer appear biased even if no bias is present. *See* R. Deffenbaugh, Namibian "Terrorism" — South African "Justice" (1977), *supra* note 164, at 253.

²⁵¹ For example, the Rockefeller Brothers Fund has provided the I.C.J. with a grant of \$20,000 for emergency missions, such as trial observer missions. Interview with Niall MacDermot, in Geneva (March 6, 1981).

²⁵² *See* Iran — Albala *et al.*/AIJD (Dec. 1978), *supra* note 14 (three observers, one of whom had already performed two previous missions to Iran).

²⁵³ Tunisia — Hassemer/AI/ILHR (1977), *supra* note 182, at 3.

²⁵⁴ For financial reasons and to increase the prestige of an observer, several organizations have at times joined to sponsor a single observer. Organizations, if they are co-sponsors of the mission, can also help disseminate the observer's report. There is some risk that the organizations may become so identified by such joint sponsorship that they lose their independent identity. Several human rights organizations with separate identities may be useful: If one

In one instance several embassies informally agreed to rotate observers so that two officials from different countries would attend every day of the trial; such cooperation should be emulated.²⁵⁵

Most observers for private organizations receive reimbursement for travel, hotel, and living expenses during their missions.²⁵⁶ Employees of organizations and governments ordinarily receive their normal salary plus expenses. Where expense is a factor, the sending organization may seek an observer from a nearby country. Private organizations may well have considered travel expenses in sending a Hong Kong lawyer to a trial in South Korea,²⁵⁷ a South African law professor to a trial in Lesotho,²⁵⁸ a Montreal lawyer to a trial of Mohawk Indians in upstate New York,²⁵⁹ a lawyer from the Dominican Republic to a Nicaraguan trial,²⁶⁰ and Australian lawyers to Indonesian trials.²⁶¹ Similarly, a government must determine whether to send a local embassy official at relatively low cost or a somewhat more prestigious, independent, and expensive observer from out of the country.

Expense is an important factor both in selecting the observer and in deciding whether a trial can be observed at all.²⁶² Funding can also influence the quality of a mission's findings. The availability of

organization has severely criticized a particular country's human rights practices, it may be useful for another organization to send the next trial observer to the same country. *See* H. Woesner, Report on Political Trials and an Assessment on the Human Rights Situation in Chile (undated) (unpublished report to Amnesty International). Joint sponsorship makes such flexibility less possible.

In addition, joint sponsorship may present problems if the organizations do not agree on their rules for sending an observer. For example, a trial observer jointly sponsored by AI and another organization might be instructed by AI not to make statements to the press, while the other organization schedules a press conference immediately after the observer's return. *See* E.C. Bamberger, Sithole Hearing (statement to the press, April 2, 1975) (after joint observer mission of Amnesty International and the Lawyers' Committee for Civil Rights Under Law to Rhodesia).

²⁵⁵ Interview with delegate of the Federal Republic of Germany to the U.N. Commission on Human Rights, in Geneva (March 9, 1979).

²⁵⁶ On very rare occasions observers have received fees for their services. Dean Arthur Larson received a legal fee of \$5,000 from the Lutheran World Federation to observe a South African trial. His expenses cost the Federation an additional \$3,000. *See* note 250 *supra*.

²⁵⁷ S. Korea — Sanguinetti/ICJ (1972), *supra* note 170, at 1.

²⁵⁸ Lesotho — van Niekerk/AI (1974), *supra* note 162.

²⁵⁹ AI, AMNESTY INTERNATIONAL REPORT 1980, at 365 (1980).

²⁶⁰ *Id.* at 364.

²⁶¹ Indonesia — Dowd/ICJ (1974), *supra* note 209.

²⁶² One AI report specifically considers the factor of distance: "Ideally this mission should have involved a delegate from a nearby Asian country, thus incurring lower travel costs. But the US-Taiwan political relationship and the short notice we received of the trial date, made it necessary for someone with suitable experience to go from the USA." Taiwan — Seymour/AI (1975), *supra* note 78, at 2. In addition, AI may have selected Professor Seymour because he had only four months previously made high-level contacts with many Taiwanese officials. *Id.* at 3.

funds will determine the length of the mission, the number of observers, the quantity of transcripts read and records copied, and so on. Financial constraints suggest that trial observer missions must be carefully selected to prevent sending organizations from overextending themselves.

C. Translators

Ideally an observer should speak the local language.²⁶³ While language ability is one of the most important criteria in selecting an observer,²⁶⁴ there is often too little time to find a person who speaks the language and possesses other necessary skills. Thus, observers often need translators to aid in observation, fact-finding interviews, and so on. The choice of a translator is fraught with its own political and practical difficulties. One American observer failed to bring his own translator to a South African trial in which much of the evidence was presented in Afrikaans and then translated into English by a court translator. The observer was unable to verify the accuracy of the translations, much like the Afrikaans-speaking defendants who could not follow the English legal arguments and procedural exchanges.²⁶⁵ Having traveled all the way to South Africa, another American lawyer found that some parts of a trial he wanted to attend were conducted only in Afrikaans, and therefore decided to leave.²⁶⁶

A German observer at a Tunisian trial relied on defense attorneys to provide translations from Arabic to French.²⁶⁷ Unfortunately, the observer sat with defense counsel to obtain his translation and must have been identified with the defense far more than is ideal for an independent observer.²⁶⁸ Moreover, relying on the defense attorneys prevents independent verification of the accuracy of the translation. The process of translation in the courtroom also requires constant

²⁶³ See, e.g., *The Ceylon Coup D'Etat Trial*, 15 BULL. INT'L COMM'N JUR. 11 (1963) (Canadian lawyer in Sri Lanka, formerly Ceylon).

²⁶⁴ For Moroccan trials it is very useful for the observer to be bilingual, because the trial is conducted in Arabic, while many police documents are produced only in French. See, e.g., Morocco — Hincker/FIDH (1976), *supra* note 216, at 12–13.

²⁶⁵ Falk, *Observer's Report on The State v. Tuhadeleni and Others*, in EROSION OF THE RULE OF LAW IN SOUTH AFRICA 51 (International Commission of Jurists ed. 1968).

²⁶⁶ S. Africa — Velleman/ICJ (1977), *supra* note 212, at 2 (Martin Garbus was the observer).

²⁶⁷ Tunisia — Hassemer/AI/ILHR (1977), *supra* note 182, at 3.

²⁶⁸ An AI observer was severely criticized by the Moroccan government for getting a one-sided picture of Morocco from his defense lawyer-translator. See ASSOCIATION INTERNATIONALE DES JURISTES DEMOCRATES, MAROC: RAPPORT DE MISSION SUR LA SITUATION DES DETENUS FRONTISTES 16 (Dec. 1977) (Comments of the Moroccan Secretary General of Justice critical of AI observer Jemoli); see Morocco — Jemoli/AI (1976), *supra* note 216.

whispering,²⁶⁹ which can be disruptive.²⁷⁰ Occasionally, however, translation may call greater attention to the observer and thus increase her impact on the participants.

Troublesome problems arise when translators come from an organization, political party, or group to which the defendant belongs. The observer may appear biased and may be unable to verify the translations. Also, if the translator is not a lawyer, he may have difficulty with the technical language used in court.²⁷¹

In some countries the selection of a translator sympathetic to the defendant may place the translator — if not the observer — at considerable risk. One German observer asked an Iranian student in West Germany to join him on a mission in Iran. The observer and translator were eventually arrested. The observer was expelled from the country; the translator was sentenced to ten years in prison for political offenses.²⁷² While this is an extreme example, such risks must be considered in particularly repressive countries.²⁷³

Another error is to rely on the services of a government translator. Not only may the translator be biased, but the observer may endanger her other contacts. Nevertheless, observers have at times accepted translators from the Ministry of Foreign Affairs²⁷⁴ and from the prosecuting team.²⁷⁵ One translator accepted on recommendation of the Iranian Minister of Information later turned out to be a Savak agent,²⁷⁶ as did another translator who had not been checked sufficiently.²⁷⁷ At a few show trials, simultaneous translation may be provided by the government²⁷⁸ and may be trusted because of the

²⁶⁹ See, e.g., L. Oranje, Report of Visit to South Africa February 18–March 6, 1974, at 1 (Mar. 18, 1974) (unpublished report) [hereinafter cited as S. Africa — Oranje/WK (1974)] (translation “in a whispering tone”).

²⁷⁰ German observers at a South African trial remained in the public gallery with their translators, so as not to disrupt the proceedings, even though another observer who did not need a translator received special seating at trial. *Id.* at 1.

²⁷¹ See, e.g., B. Wrobel, Notes on a Mission to Iran, April 9–12, at 12 (May 1977) (unpublished report to Amnesty International) [hereinafter cited as Iran — Wrobel/AI (1977)] (private translator hired, but he lacked the vocabulary for translating formal court proceedings).

²⁷² AI, AMNESTY INTERNATIONAL ANNUAL REPORT 1971–1972, at 49 (1972); AI, AMNESTY INTERNATIONAL ANNUAL REPORT 1970–1971, at 68–69 (1971).

²⁷³ See, e.g., S. Korea — Sanguinetti/ICJ (1972), *supra* note 170, at 1 (translator under surveillance).

²⁷⁴ See, e.g., Amnesty International, Report on a Mission to Ethiopia and Sudan, 1–18 February 1975, at 7 (March 25, 1975) (unpublished report) [hereinafter cited as Ethiopia — AI (1975)].

²⁷⁵ See, e.g., *id.*

²⁷⁶ See Iran — Wrobel/AI (1977), *supra* note 271, at 2; Interview with Brian Wrobel, Bad Honnef, Federal Republic of Germany (Sept. 16, 1977).

²⁷⁷ See Iran — (Albala/AI (1972)), *supra* note 67, at 4.

²⁷⁸ See, e.g., Papadatos, *The Eichman Trial*, 14 BULL. INT’L COMM’N JUR. 13, 14 (1962). Although there was simultaneous translation into English, French, Spanish, and Russian at

large number of bilingual observers present.

One solution which a number of private observers have tried with mixed success is to ask the observer's embassy to assist in finding a translator.²⁷⁹ Embassy observers can ordinarily rely on translators from the embassy staff. But the embassy may be reluctant to provide a translator for, and thereby identify with, a private observer. However, when an embassy arranges for an outside translator or provides an embassy translator, he may be less subject to harassment and may provide a more balanced translation than others. Embassies have tended to be most helpful to prestigious observers from their home country, such as members of the legislature or former ministers. If the embassy is hesitant to aid the observer directly, it may suggest local independent lawyers who have the requisite language skills and sufficient prestige to escape harassment.

Some observers have been able to secure translators through personal contacts,²⁸⁰ through the local bar association,²⁸¹ or with the assistance of the sending organization.²⁸² It is generally best to find a translator before arrival in the country, but some observers have been able to hire a translator upon arrival.²⁸³ Others have simply appeared at the courtroom and obtained translation assistance from journalists,²⁸⁴ lawyers in the courtroom, or other observers.²⁸⁵ But ideally the observer should secure a translator who is legally trained, knowledgeable, trustworthy, and, so far as possible, immune from reprisal.²⁸⁶

the Angolan mercenary trials, the translation may not have been adequate. L. HINDS & H. STEVENS, *THE TRIAL OF THE MERCENARIES*, JUNE 7-19, 1976, at 19-20 (Nat'l Conf. of Black Lawyers). See also Williams, *supra* note 5, at 30-31.

²⁷⁹ See, e.g., G. Gardiner, Report on Mission to Athens, 2-5 October 1972, at 3 (unpublished report to Amnesty International) [hereinafter cited as Greece — Gardiner/AI (1972)] (successful); Iran — Wrobel/AI (1977), *supra* note 271, at 2 (not successful).

²⁸⁰ See, e.g., Turkey — Noll/ICJ (1973), *supra* note 163; W. Booth, Report to the International Commission of Jurists on Windhoek, Namibia Trial 1 (March 1972) (unpublished mimeo) (church contacts).

²⁸¹ See, e.g., D. Napley, Steven Biko Inquest 1 (Dec. 8, 1977) (unpublished memorandum) [hereinafter cited as S. Africa — Napley (1977)].

²⁸² See, e.g., Greece — Gardiner/AI (1972), *supra* note 279, at 2.

²⁸³ See, e.g., Iran — Wrobel/AI (1977), *supra* note 271, at 12.

²⁸⁴ See, e.g., C. Grobet, Le procès de M. Stathis Panagoulis 18-20 janvier 1973, at 1-2 (1973) (unpublished report to the International Commission of Jurists) [hereinafter cited as Greece — Grobet (1973)]; Indonesia — Dowd/ICJ (1974), *supra* note 209, at 1.

²⁸⁵ See, e.g., E. Poulsson, *The Treason Trial in Morocco*, 18 BULL. INT'L COMM'N JUR. 26, 29 (1964) [hereinafter cited as Morocco — Poulsson/ICJ (1964)].

²⁸⁶ In addition, the translator and the observer may each want to take notes in order to compare notes after each day's session and improve the reliability of their findings. See, Williams, *supra* note 5, at 2.

D. *Briefing the Observer*

Having selected an observer, decided when to send him, and considered problems of translation, the organization or government must brief its representative. Usually the sponsor possesses a considerable quantity of information which must be communicated to the observer. Briefing presents a particularly difficult problem when observers are selected at the last moment and the distances involved are great.

The observer should become as informed as possible of the history, politics, economics, and law of the country to be visited.²⁸⁷ The observer should obtain background information concerning the human rights problems, foreign relations, and government officials of the country, as well as data relating to the specific events which led to the trial.²⁸⁸ The observer should also receive any organizational guidelines for the conduct of observers and learn about the previous relations between the sending organization or government and the country of the trial.²⁸⁹

²⁸⁷ Obviously, each trial observer mission will require specific and up-to-date information on the country to be observed, but there exist some general reference sources which might begin to orient the observers. As to the criminal justice system of each country, the U.S. military has prepared Country Law Reports on the principal nations where U.S. service personnel might be arrested. *See, e.g.*, U.S. Army Judge Advocate Division, Country Law Study, German Law and the Status of American Troops in Germany (1963) (unpublished memorandum); U.S. Army Office of the Judge Advocate, Country Law Study for Korea (May 1, 1971) (unpublished memorandum). While overly diplomatic, these studies are very useful outlines of the criminal procedures of many countries. Similarly, the State Department Assistant Legal Advisor for Consular Affairs maintains a collection of legal studies for understanding the problems of U.S. citizens arrested abroad. These studies should also be useful to trial observers.

More general and even more limited by diplomatic-considerations are the annual Reports on Human Rights Practices in Countries Receiving U.S. Aid, but these documents are still worthy of consideration particularly for a prospective observer for the U.S. government to review what is officially known about the country's situation. *See, e.g.*, note 192 *supra*. Although Amnesty International intends its annual reports only as a record of what that organization has done each year, the AI annual reports and any specific reports on the country to be visited should be useful background reading. *See, e.g.*, notes 191-193 *supra*.

²⁸⁸ In briefing Dean Pollack for his mission to observe the Biko inquest, the Lawyer's Committee for Civil Rights Under Law Southern Africa Project gave him a briefing paper, including summaries of the available facts on Biko's death from newspapers, official government statements, the writings of Stephen Biko, the South African political situation, a prior observer's report on South Africa, and the Martin-Achard article on trial observation. *See* note 170 *supra*; South Africa Project of the Lawyer's Committee for Civil Rights Under Law, Stephen Bantu Biko: A Briefing Paper (undated) (unpublished mimeo); *see* note 178 *supra*.

²⁸⁹ In briefing a mission to observe a trial in South Africa, the International Commission of Jurists gave the observer a copy of the I.C.J. guidelines for observers, a copy of previous trial observer reports for the I.C.J., a typescript precis of what had happened at the first abortive trial in the same case, and an older I.C.J. publication on the rule of law in South Africa. *See* J. Lovatt-Dolan, Interim Report on Trial in Johannesburg, South Africa 1 (undated, 1978) (unpublished report to the International Commission of Jurists) [hereinafter

A principal source of information for the new observer is past observer mission reports.²⁹⁰ If the observer has sufficient time before departure, she may be able to make a considerable factual inquiry. Legal documents are often available and the long distance telephone is a very useful investigative tool. In addition, the observer should receive the names of people who can serve as contacts and informants in the country to be visited. It will often be necessary for the observer to use personal contacts rather than relying entirely upon the sending organization or government in this respect.²⁹¹ The contacts and informants should be selected so as to avoid involving the observer in partisan quarrels or otherwise affecting the observer's appearance of impartiality. An observer may be able to obtain information from expatriate political groups, but should avoid identifying with them and make his independence clear.²⁹²

E. Travel and Housing Arrangements

The observer ordinarily must make travel and housing arrangements.²⁹³ Here again, she must be circumspect. It would generally not be a good idea, for example, to stay in the home of a defense attorney because that would identify the observer with one side of the trial.²⁹⁴ Similarly, the observer should arrange for her own trans-

cited as S. Africa — Lovatt/ICJ (1978)]; see also note 462 *infra*. Interview with George Lockwood in Winnipeg, Canada, June 2, 1979; Lockwood, *Report on the Trial of Mercenaries: Luanda, Angola, June, 1976*, 7 MANITOBA LAW J. 183-86 (1977).

²⁹⁰ J. Hoss, Rapport de la mission effectuée au Maroc du 28 Avril au 31 Mai 1976 *supra* note 216, at 1; J. Portelle, Rapport de mission à la Fédération Internationale des Droits de l'Homme (Feb. 1972) (unpublished report to the International Federation for Human Rights); L. Velleman, Report on the Second Breytenbach Trial, *supra* note 212, at 2 (retiral observed, so previous trial observation report can be used for comparison). Sending organizations regularly exchange information and can assist in briefing future missions to the same country.

²⁹¹ Amnesty International, Report on a Mission to Ethiopia and Sudan, 1-18 February 1975, at 4 (March 25, 1975) (unpublished report to Amnesty International); Gardiner, *The South African Treason Trial*, 1 J. INT'L COMM'N JUR. 43, 44 (1957).

²⁹² E. Schmidt, Preliminary Report on the Trial of the El Ferrol 23 (July 4, 1975) (unpublished report to the National Lawyer's Guild) (the observer was a member of the U.S. Committee for a Democratic Spain, upon which he relied for briefing information and which may have affected his appearance of impartiality).

²⁹³ One AI observer had not made advance hotel arrangements and was forced to waste considerable time in finding accommodations. Y. Ersoy, Rapport sur la mission en Egypte (19-26 mars 1975), at 2 (undated) (unpublished report to Amnesty International) [hereinafter cited as Egypt — Ersoy/AI].

²⁹⁴ An AI observer spent the last night of his mission in the home of a defense attorney without apparent impact on the independence of his mission; the observer had already established a good "rapport" with the prosecutor, judge, the captain of the security police, and others involved in the case. C. Thornberry, *State v. Taapopi and Kashea: Report to Amnesty International and the Lawyer's Committee for Civil Rights Under Law on Trial Held 17-21 June 1974*, *supra* note 226, at 1; see also note 168 *supra* and accompanying text.

portation from the airport to a hotel of at least moderate prestige and reasonable proximity to the courthouse. If the prosecution and the defense counsel are themselves staying in a hotel, the observer might select another hotel. So far as possible, the observer should avoid visibly identifying with the defense by staying in the same hotel. So long as the observer explains his conduct to the defense, he might even err on the side of appearing to identify with the prosecution by staying in the same hotel.

In arranging outbound travel, security might suggest that the observer book a flight with a carrier other than the national airline of the trial country. On occasion departing observers have been harassed; under such circumstances a neutral airline might be helpful in facilitating departure.²⁹⁵

F. *Visas and Entry Formalities*

In general, sponsoring organizations try to select observers who do not need visas to enter the country of the trial.²⁹⁶ If visas are required, difficulties and delays can imperil the mission.²⁹⁷ Observers requiring a visa have used a variety of approaches. Some have been admitted after explaining their mission and showing the authorization of the sponsoring organization.²⁹⁸ A few others have been delayed until the trial was over. Several observers have applied for tourist visas or stated that they were traveling on legal business.²⁹⁹ The Soviet Union once complained that an observer used false pre-

²⁹⁵ See Czechoslovakia — Goldman/AI (1980), *supra* note 234, at 2, 11 (four and one-half hours detention); A. Leaud, Rapport du procès de Jesus Diz Gomez *et al.*, *supra* note 163, at 5 (20 hour detention).

²⁹⁶ Amnesty International evidently selected a U.S. observer for a trial in Taiwan because of his expertise, the importance of U.S.-Taiwanese relations, and because he was apparently the only qualified observer already possessing a visa to enter Taiwan. See Taiwan — Seymour/AI, *supra* note 78 at 14.

²⁹⁷ See notes 71, 72, and 74 *supra* and accompanying text. Another problem about asking permission to observe a trial is that such a request requires an official of the government to accept the proposition that the trial needs observing. It might be easier for the government merely to acquiesce in the sending of the observer, because the trials are open to the public. Further, nongovernmental organizations take the position that they have a right to send international observers to trials. *South Africa — The United Nations Special Committee on Apartheid and a Sabotage Trial*, 17 INT'L COMM'N JUR. BULL. 41, 45-46 (1963). Hence nongovernmental organizations have properly established the practice of merely notifying the government that an observer is coming to the trial without requesting permission.

²⁹⁸ See, e.g., ARGENTINA — N.Y. BAR REPORT *supra* note 190, at 2; see generally S. Africa — Velleman/ICJ (1977), *supra* note 212. A British observer sought a visa to enter Egypt as a representative of AI, but did not specifically refer to the trial to be attended. See Interview with Michael Williams in London (June 1978) *supra* note 209.

²⁹⁹ Interview with L. Blom-Cooper, an experienced trial observer, in Tallahassee, Florida (May 1979).

tenses in applying for a tourist visa,³⁰⁰ which suggests that it is not advisable to misrepresent the purpose of the visit.

Rather than asking permission to send an observer,³⁰¹ the principal organizations have developed the practice of simply informing the government which is holding the trial that an observer will attend.³⁰² The observer need not await permission to enter since the government's silence is taken as assent. Occasionally a government will object to the mission and the observer may be detained at the airport or restrained from entering the courtroom.³⁰³ It is extremely rare for observers to be harassed for harassment is usually followed by considerable public criticism of the government.³⁰⁴

Upon arrival, the observer, with or without a visa, may be questioned as to the purpose of his visit. Observer practice varies from complete disclosure of the purpose of the mission to "legal business" or "business." Any further inquiry could be satisfied by giving the name of the attorneys for the defense or the prosecution.

G. *Public Announcement of the Mission and Statements During the Mission*

There is considerable variation among governments and organizations with regard to making public statements before or during an observer mission. Governments generally do not publicize their observer activities. The mere presence of an observer is itself a statement of considerable moment; public statements might unnecessarily antagonize the prosecuting government. The British and United

³⁰⁰ Soerheim, *Report to Amnesty International concerning my journey to Moscow in connection with the trial of Ginzburg, Galanskov, Dobrovolsky and Lushkova*, in *THE TRIAL OF THE FOUR* 376 (P. Litvinov ed. 1972).

³⁰¹ Having been refused entry to a 1975 trial, AI apparently made preliminary contacts with the government of Taiwan and obtained assurances that a seat had been reserved for the AI observer at a 1980 trial. *Amnesty International to Observe Military Trial in Taiwan*, Amnesty International Press Release (Mar. 20, 1980).

³⁰² A typical telegram of introduction reads as follows: "International Commission of Jurists representing 39,000 jurists in 62 countries [have the] honor [to] inform you that Silverio Coppia, distinguished criminal lawyer from Rome, will attend as observer [the] trial [of] Professor Tierno Galvan and co-accused. [We] would appreciate your cooperation [in making] all arrangements necessary for the accomplishment [of] this purpose [Signed] Secretary General, International Commission of Jurists", [Press Release] (Mar. 8, 1961); *see also*, e.g., International Commission of Jurists, Telegram to Greek Minister of Justice, January 17, 1973.

³⁰³ *See, e.g.*, Poland — Hadding/ICJ (1980), *supra* note 74 (detained at airport).

³⁰⁴ In 1979, AI sent an Austrian lawyer to observe a trial and appeal hearing in Czechoslovakia. On one occasion the observer was detained for four and one-half hours and then expelled from the country. AI publicly protested this treatment of the observer and also issued a severe critique of the fairness of the proceedings. *See* AI, *AMNESTY INTERNATIONAL REPORT* 1980, at 261 (1980).

States governments have, however, publicly protested the refusal of Czech authorities to permit observation of political trials in that country. Also, the United States government has publicly expressed its concern about the fairness of several trials in the Soviet Union. These statements may be based on information provided by observers, but they are not identified with the observers themselves. Usually diplomatic observers report only to their governments regarding the trials they attend. Their governments may infrequently make discreet comments to the prosecuting government, or even more rarely to the public at large.

Nongovernmental organizations are more likely to announce an observer mission. The International Commission of Jurists has a general practice of announcing the selection and sending of its observers.³⁰⁵ Amnesty International announces only a few of its observer missions; in the year 1979-80 it sponsored eighteen trial observer missions³⁰⁶ and publicly announced its intention to send only three.³⁰⁷ There is a risk that in some countries, such as Kenya and Qatar, public announcements embarrass the government and make it harder for the observer to be admitted to the trial. In situations where the nongovernmental organization expects to make an issue of the government's refusal to permit an observer or where there is very little risk of such a refusal, a press release may assist in drawing the world's attention to the trial.³⁰⁸ In every case, the expected usefulness of a public statement must be weighed against the potential consequences.

As for public statements during observer missions, Amnesty International has adopted a relatively consistent position that observers should make no such statements. At least three principles support this policy. First, by assuring the government that the observer will make no public statements, the organization may be able to persuade the government to cooperate.³⁰⁹ Second, the observer represents Amnesty International at the trial, but cannot speak for the organiza-

³⁰⁵ See, e.g., *Following Demonstration of White Students in South Africa, ICJ Sends Observer to Capetown Trial*, International Commission of Jurists, Press Release (Aug. 8, 1972).

³⁰⁶ AI, AMNESTY INTERNATIONAL REPORT 1980, at 359 (1980).

³⁰⁷ *Id.* at 392, 396-97. The press office of Amnesty International limits the total number of releases it issues during each week, so that one may not be able to infer any particular policy as to the public announcement of observer missions from this data.

³⁰⁸ Rather than use overt publicity, Amnesty International has occasionally asked its far-flung membership to send letters to government authorities asking about the prisoners to be tried. Having received hundreds or thousands of such letters, the government may desire an observer to clear itself of these doubts. AI, AMNESTY INTERNATIONAL ANNUAL REPORT 1965-1966, at 9 (1966).

³⁰⁹ See International Commission of Jurists, Press Release (Mar. 8, 1961).

tion. Only after due consultation and consideration can the organization's position be announced. Third, public statements in the country of trial may endanger the mission,³¹⁰ the appearance of neutrality,³¹¹ and even the safety of the observer.

Other organizations do not appear to have the same strict rules against public statements during and shortly after observer missions.³¹² It is not unusual for observers to issue public statements immediately after their return. Media attention usually focuses on the observer at the end of the trial and a public statement has the greatest impact at that moment. While the sending organization may have its own perspective, the observer certainly has sufficient expertise to comment on the broad issue of fairness. Sometimes organizations experience difficulty when their observers issue conclusions to the media, but do not acknowledge their sponsoring organization and fail to prepare a more reasoned, complete report later.

H. *Briefing After Arrival*

Before arrival the observer should have an idea of whom to interview. The defense will usually be most helpful in providing assistance and information,³¹³ but the observer should also try to maintain

³¹⁰ AI trial observers in Nicaragua gave the local press in the courtroom information about AI and why they were attending; considerable local publicity resulted in communicating AI's concern to the general population, but caused the trial to be immediately postponed. See AI NICARAGUA REPORT, *supra* note 73. Since the AI representatives were on a general fact-finding mission, the publicity in this situation was probably helpful in notifying interested persons that the AI mission was in Nicaragua and could be contacted.

³¹¹ One observer gave a press conference the day he arrived to explain why he was attending a trial in Namibia and that he represented the I.C.J.; he made several negative comments on Namibian racial conditions to the press. Thereafter he was publicly criticized for interfering with the trial and was placed under police surveillance. See W. Booth, Report to the International Commission of Jurists on Windhoek, Namibia Trial, *supra* note 280, at 3. Another risk of making a press statement during the mission is exemplified by the experience of an I.C.J. observer in Turkey who gave an interview to a government-controlled newspaper. The observer began the interview by commenting favorably on a few aspects of the trial, which the journalist noted. As soon as the observer began to criticize other aspects of the trial, the journalist put away his notebook and began arguing with the observer. The next day an article appeared quoting only the observer's complimentary remarks about the trial. Turkey-Noll/ICJ (1973), *supra* note 163, at 3.

³¹² While wanting to avoid the risk of an interview with the press, the observer may wish to tell the press his name, country of origin, professional qualifications (e.g. lawyer, judge, law professor), and the name of the sponsoring organization(s). Aronstein, *Acquittement à Madrid ou le Franquisme ordinaire*, 62 REVUE NOUVELLE 451, 456, 461 (1975). Most of this information should be contained in the observer's Order of Mission, which might be transmitted to the press. If the newspapers note the observer's presence at the trial, the observer may have a greater impact on the trial participants.

³¹³ Upon arrival, the first contact of the observer is ordinarily with the defense counsel, who can explain the procedural posture of the case, the tactics of the defense, the applicable laws, the court procedures, and the other circumstances surrounding the case. See, e.g., Tunisia — Hassemer/AI/ILHR (1977), *supra* note 182, at 1. The defense attorney may be able to

a balance by making contact with the prosecutor,³¹⁴ judge,³¹⁵ government officials,³¹⁶ and others who can provide useful information.³¹⁷ As always, the observer must remain impartial, independent, and a bit aloof.

assist the observer with introductions to other participants in the trial. *See, e.g.,* J. Lovatt-Dolan, Interim Report on Trial in Johannesburg, South Africa, *supra* note 289, at 1. But the observer should try to avoid appearing as an adjunct of the defense and may thus want to arrange for introductions by a leader of the local bar or some other uninvolved lawyer of high prestige. On a mission to attend a Bulgarian trial, however, the observer found the defense lawyer unwilling to cooperate. Bulgaria — Spetter/AI (1974), *supra* note 68. That defendant, however, may not have been represented by a real advocate. In another case the defense was not helpful to the observer, because the defense tactic was to seek a light sentence by being cooperative with the government. *See* S. Africa — Morand/ICJ (1975), *supra* note 182, at 1. Yet another observer found the defense counsel to be rather cool at first, but cooperation grew through the trial and the defense counsel finally provided the observer with all the documents needed for the mission. S. Africa — Velleman/ICJ (1977), *supra* note 212, at 2.

³¹⁴ *See, e.g.,* Greece — Ellman/ICJ, *supra* note 31, app. at 3; S. Africa — Lovatt/ICJ (1978) *supra* note 289, at 7: "I explained my position and purpose of my attendance to the prosecutors and to counsel for the defense." At best, the observer may gain the cooperation of all participants. At worst, the observer's presence will be known to the parties and they may be wary about their conduct.

"The legal delegate of the International Committee of the Red Cross followed thirty-five trials of protected persons before courts in Gaza, Hebron, Ramallah, [and] Nablus. . . . In connection with this activity he maintained regular contacts with the lawyers for the detainees and with the prosecutors and Israeli judicial authorities." INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 1977, at 10 (1978). *See also* INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 1978, at 32 (1979).

³¹⁵ Observers frequently are invited or seek interviews to speak with the presiding trial judge. *See, e.g.,* Turkey — Noll/ICJ (1973), *supra* note 163, at 2 (by invitation); Spain — Leaud/AI (1975), *supra* note 163, at 1 (clerk of the court indicated judge did not want to see the observer before trial); S. Africa — Lovatt/ICJ (1978), *supra* note 289, at 1 (introduced by defense counsel); C. Morand, Report on the SASO/BAC Trial 1 (Dec. 16, 1975) (unpublished report to the International Commission of Jurists). Military observers also frequently meet with the trial judge. *See* Williams Thesis, *supra* note 162, at 48-49. The observer's meeting with the judge (1) may be merely a courtesy call, (2) may help to assure that the observer will, in fact, be admitted to the courtroom and (3) be given appropriate facilities, (4) may help to bring home to the judge the presence of the observer, and/or (5) may involve discussion of the case.

³¹⁶ By interviewing various high level government officials, such as the Secretary of State, the Minister of State who was a former Supreme Court Justice, the Vice-Chief of Savak, and the Minister of Information, an observer avoided any accusation that he had failed to learn both sides of the story. *See* H. Wandschneider, Report on a Mission to Teheran, September 1-15, 1965 (unpublished report to Amnesty International) [hereinafter cited as Iran — Wandschneider/AI (1965)].

³¹⁷ One useful source of information and practical assistance may be the embassy of the observer's home country. *See* ARGENTINA — N.Y. BAR REPORT, *supra* note 190, at 5 (U.S. Embassy); South Korea — Sanguinetti/ICJ (1972), *supra* note 170 app. (British Embassy); S. Africa — Velleman/ICJ, (1977) *supra* note 212, at 1 (Dutch Embassy); Ivory Coast — Picard/AI, *supra* note 221, at 5 (1974) (French Embassy); J. Braunschweig, L'Etat actuel de la répression politique en Iran 1 (Feb. 6, 1976) (unpublished report to the International Association of Democratic lawyers) [hereinafter cited as Iran — Braunschweig/AIJD (1976)] (French Embassy). The home country embassy might also be informed of the observer mission before arrival, upon arrival, or at some later stage, either as a courtesy or if the observer fears any retaliation by the government of the country visited.

Observers differ greatly in the extent to which they make contacts with officials and undertake investigations beyond the trial itself. A few observers view their role as merely to sit at the trial and to take notes. Most observers make efforts to interview the principal participants in the trial — the defense attorney, prosecutor, judge, and defendant. A few observers have even spoken to the jury foreman and to witnesses.³¹⁸

Some observers also view their missions in a broader diplomatic or professional context. If the observer is in a small country, or if he has a great deal of prestige, he may interview high government officials³¹⁹ and leaders of the bar. Such discussions help inform the observer of all the circumstances surrounding a trial, particularly one with highly political overtones. Contacts with government officials may also increase the observer's impact on the trial process. Unfortunately, some individuals who are sent only to observe a trial purport to represent the sponsoring organization in a broader sense when meeting with government officials. The observer should not step beyond the mission for which she was briefed, nor place more pressure on the government than the sponsor believes is appropriate.

Obviously, the observer's first obligation is to observe the trial, but during recesses and on other occasions the observer should be able to make contacts with government officials. Some observers may even decide not to attend the testimony of minor witnesses in favor of interviewing critical officials.

In addition to pursuing discussions outside the courtroom, the observer should prepare for the trial by obtaining copies of important court documents. In common law countries there may have been a preliminary hearing which will reveal a substantial portion of the prosecution's case and may shape the cross-examination of witnesses at the trial. In civil law countries, the file generated by the examining judge is ordinarily the central focus of the trial. Thus, it is criti-

³¹⁸ Interview with J. Luthi in Geneva (Sept. 7, 1978) (concerning his observation of the Valpreda trial in Rome).

³¹⁹ An I.C.J. observer in Madagascar met with the Minister of Justice, the President of the Supreme Court, and the Prosecutor General of the Military Court. Madagascar — Noll/ICJ (1975), *supra* note 187, at 1. A New York Bar Association delegation met with the Argentine Minister of Justice, the President of the Supreme Court, a member of the ruling junta, and legal advisors to the President of Argentina. ARGENTINA — N.Y. BAR REPORT, *supra* note 190, at 4–5. Another observer met with the second and third ranking members of the Ministry of Justice to discuss the areas of human rights concern of Amnesty International and the I.C.J. S. Korea — Sanguinetti/ICJ 1972, *supra* note 170, at 10–12. Several observers had meetings with the South African Attorney General. *See, e.g.*, S. Africa — Morand/ICJ (1975), *supra* note 182, at 1; S. Africa — Velleman/ICJ (1977), *supra* note 212, at 1.

cal that the observer obtain access to the defendant's file.³²⁰ Ordinarily, the defendant's counsel has access to the file and should be able to make available all the necessary documents. In some countries the public stage of the trial merely confirms the conclusions of the investigatory judge. Indeed, the public proceeding may be little more than a sentencing hearing. In any case, the observer should obtain the key documents that will be used in the courtroom and that will be essential to a full understanding of the trial.

I. *The Observer's Entry and Seating in the Courtroom*

In order to obtain entry and a seat in the courtroom the observer may need to present his Order of Mission to the Ministry of Foreign Affairs, the Ministry of Justice, or to the presiding judge.³²¹ Some early observers seated themselves with the defense counsel at trial.³²²

³²⁰ In observing a trial in Ecuador, the observer was given full access by the government to the official trial records and interviewed the original examining judge as well as members of the military court. *The Trial of Professor Galarza and Others*, 13 INT'L COMM'N JUR. REV. 60 (1974).

³²¹ While a trial in Turkey was supposedly held in public, the observer would not have been able to attend without the help of the Ministry of External Affairs: "In theory trials are held in public, but one has to go through so many formalities to be able to attend them that in practice it is almost impossible to do so. Formalities entail photographs and a special visa issued by the military Martial Law Commander. The courts sit in remotely situated military camps. The tribunal which I attended was sitting in a military veterinary school and was very well guarded by the army. To have access to the area it was necessary to have a pass and an additional pass was needed to get into the courtroom." Turkey — Noll/ICJ (1973), *supra* note 163, at 1; C. Grobet, Trial of Five Frap Members Before the Military Court of Madrid, September 11, 1975, at 3 (Sep. 12, 1975) (unpublished report to the Fédération Internationale des Droits de l'Homme) [hereinafter cited as Spain — Grobet II/FIDH (1975)] (Minister of Justice); Morocco — Jemoli/AI (1976), *supra* note 216, at 1 (Minister of Justice). The observer might see that the judge's or minister's arrangements are communicated to any security guards at the courthouse. Compare C. Grobet, Le procès en appel des 1001 ("Les Dix de Carabanchel") devant le Tribunal Suprême de Madrid, 11 février 1975 (Feb. 12, 1975) (unpublished report to Amnesty International and the Fédération Internationale des Droits de l'Homme) [hereinafter cited as Spain — Grobet/AI/FIDH (1975)], with Egypt — Ersoy, note 293 *supra*. In one case, when "the observer presented himself at the courtroom doors, he was first told that there was no room (even though the general public had not yet been allowed in). Then when the observer presented his 'order of mission' from the I.C.J. to the head of court security, this fellow immediately became very obliging and ordered another guard to 'show the guest' into the courtroom." Spain — Grobet/ICJ (1974), *supra* note 175, at 5 (rough translation from French); see also Thailand — Kopp/ICJ (1977), *supra* note 211, at 8-11.

The Austrian government apparently takes the position that a foreign government observer should obtain prior permission from the Ministry of Justice through the Ministry of Foreign Affairs, but that observers would be given permission routinely and military observers do not need prior permission.

³²² Four foreign observers were seated at their request with the defense counsel. Spain — Aronstein/BLDHR (1972) *supra* note 207; see also J. Ray, Egypt Mission Report (July 1977) (unpublished report to Amnesty International) [hereinafter cited as Egypt — AI (1977)] (seated with defense lawyers). Another observer sat next to the wife of the defendant, which

In doing so, they may have shown their importance to the proceedings, but also may have appeared more as adjuncts to the defense than as neutral, independent observers.

Other observers have taken seats with the public.³²³ The public, however, is usually assigned the least desirable seating — often making it difficult to see and hear the proceedings.³²⁴ Also, the observer may have little impact seated in such a low visibility and low prestige location.

Many observers have chosen to sit among disinterested local attorneys so as to demonstrate their higher prestige, to permit them to see and hear better, and to avoid identifying with the adversaries.³²⁵ A few observers have been considered equivalent to the international press and have sat close to the front of the courtroom, but this location may confer less than ideal prestige on the observer.³²⁶

Several observers have requested special accommodations at trial.³²⁷ At some trials of great international interest there are so many foreign observers that a whole section of the gallery is desig-

certainly gave moral support to the defendant, but did not help the observer's appearance of independence. Michael Williams interview, *supra* note 209; see also note 165 *supra*.

Military observers usually sit in the public gallery, although some sit with defense counsel or in a more neutral spot in the front of the courtroom. Williams Thesis, *supra* note 162, at 49. Col. Williams recommends that military observers sit with defense counsel, so that they can advise on lines of defense not already taken. Williams, *supra* note 5, at 85 n.228. Obviously, such a seating makes the military observer an adjunct of the defense, but that probably is the inevitable position of the military observer.

³²³ One observer arranged seating in the front row of the public section where he was quite visible. See Aronstein, *supra* note 312, at 456-57. A white U.S. observer in a South African courtroom proceeding found that he and his companion were the only two people in the white section of the public gallery. The observer was obviously visible in this situation, although he was also obedient to South African racial restrictions. S. Africa — Garbus/ILHR (1977), *supra* note 176, at 6. Some observers at the Angolan show trial of the mercenaries were so poorly seated that they could not hear or see well enough to determine whether the proceedings were fair. Angola — Hinds/Stevens, *supra* note 278, at 1-4.

³²⁴ See AI NICARAGUA REPORT, *supra* note 73 (the observers were unannounced and attempted to blend in with the public).

³²⁵ See, e.g., K. Madlener, Trial of the Case Tribunal de Orden Publico 1001/1972 ("Carabanchel Ten"), Madrid, December 20-22, 1973, at 1 (Jan. 7, 1974) (unpublished report to the International Commission of Jurists) [hereinafter cited as Spain — Madlener/ICJ (1973)].

³²⁶ An I.C.J. observer was seated with the international news media who sat right behind the defense lawyers in a Moroccan courtroom. See Morocco — Suckow/ICJ (1974), *supra* note 201, at 1. But see Spain — Leaud/AI, (1975), *supra* note 163, at 2-4 (observer sat himself with the press without court approval). In an Iranian show trial the foreign observers were seated with the press. Iran — Wrobel (1977), *supra* note 271, at 3-4; see also L. Blom-Cooper, Iran, November, 1965 (unpublished report to Amnesty International) [hereinafter cited as Iran — Blom-Cooper/AI (1965)] (sat in the press section).

³²⁷ While observing a trial in Sri Lanka, the observer applied to the court for daily transcripts, which he received. *The Ceylon Coup d'Etat Trial*, *supra* note 263. Another observer met with the Attorney General and successfully requested that part of the proceedings be held in English for the observer's benefit. S. Africa — Morand/ICJ (1975), *supra* note 182.

nated for them.³²⁸ One observer in an Oregon trial successfully sought a table in the center of the courtroom so as to better hear and see the proceedings.³²⁹ This special accommodation both impressed the trial participants with the observer's importance and enhanced his effectiveness as an observer.³³⁰

Some observers see themselves as guests and ask for no special privileges.³³¹ But such passivity may result in a loss of prestige and effectiveness. Because every courtroom has its own architecture and configuration, the observer must be very sensitive to the importance of seating and should, if necessary, seek some accommodation to preserve an appearance of impartiality and to facilitate observation of the trial.

J. *Introduction in Open Court*

Some observers have asked to be introduced in open court so that their presence is officially recognized by the participants and the public.³³² If the observer has been selected for her prestige and is

³²⁸ There were five foreign observers at a trial in Tunisia who were given reserved seats in a special section of the courtroom, although the defense attorney was required to stand with the public. Tunisia/AI/ILHR (1977), *supra* note 182, at 3. There were about 25 international observers at a Spanish trial who were seated with priority in the public section. E. McGovern, Report on the Trial of Marcelino Camacho and Nine Others by the Public Order Court, Madrid 20-22 December 1973 (Jan. 8, 1973 [sic]) (unpublished report to Amnesty International) [hereinafter cited as Spain — McGovern/AI (1973)]; Interview with E. McGovern in London (July 1, 1978). The trial of former dictator Macias was held in a theater; 30 foreign diplomats and the I.C.J. observer sat in a special section. EQUATORIAL GUINEA — TRIAL OF MACIAS, *supra* note 32, at 22.

³²⁹ Interview with Brian Wrobel, Amnesty International Observer, in Strasbourg, France (Sep. 1978). In another case a Dutch observer asked for, and was granted, seating closer to the proceedings so that he could hear better than was possible in the public gallery. *See* S. Africa — Oranje/WK (1974), *supra* note 269, at 1.

³³⁰ Similarly, the I.C.J. and U.S. Embassy observers at a Namibian trial sat at a special table in front of the courtroom, while church observers with lesser prestige remained with the public in back. Namibia — Deffenbaugh/LWF (1976), *supra* note 164, at 46. To increase his visibility at trial one observer dressed in the robes he would have worn had he been attending a trial in his own country. Aronstein, *supra* note 312, at 456. Military observers normally dress in uniform to maximize their presence in the courtroom. Williams Thesis, *supra* note 162, at 85 n.226 and 49 n.122.

³³¹ A Canadian observer sat initially with the public, but as soon as the court recognized that he was a practicing barrister, it gave him a special neutral spot at counsel bench right between the prosecution and the defense. India — Sheppard/ICJ (1976), *supra* note 246, at 27.

³³² *See* Egypt — AI (1977), *supra* note 322. The treasurer of the local bar association introduced observers from Amnesty International and the British Parliamentary Human Rights Group to the court at the June 1980 opening session of an arson trial in Guyana. Two observers from nongovernmental organizations and an observer from the U.S. Embassy were not publicly introduced. *See generally* D. Weissbrodt, Report on First Week of the Arson Trial at Georgetown, Guyana (July 9, 1980) (unpublished report to Amnesty International) [hereinafter cited as Guyana — Omwale et al./AI (1980)].

properly seated at the trial, such an introduction may be unnecessary because everyone will recognize her.³³³ But, if the observer feels that such an introduction would increase her impact, there is little reason to discourage such an effort. Introduction by some neutral party, such as the president of the local bar association, probably would best preserve the observer's independence. If, however, the observer only intends to remain for part of the trial, an introduction would underscore her later absence and might be unwise.

K. *Taking Notes at the Trial*

There is no better way for an observer to make her presence felt than to take copious notes. However, some countries, such as Spain, forbid anyone from taking notes except for participating lawyers and the press.³³⁴ One Amnesty International observer who had not made specific arrangements for seating at a Spanish trial assumed that he would be considered equivalent to the press and sat in the press section taking notes. The observer was arrested after the court session and expelled from the country.³³⁵

Another difficulty with taking notes, particularly after talking with informants, is that notes may be subject to seizure or surreptitious review by the police.³³⁶ Hence, some observers in less secure settings take very sketchy notes and begin preparing their reports only after departure.

L. *Fact-finding by Trial Observers*

Besides reporting what they see at trial, observers often need to make factual determinations as to events which occurred out of their presence. Frequently, observers function as fact-finders who assess the evidence presented at trial, add outside information, and reach an overall decision as to the fairness of the proceedings, which may necessarily require a judgment on the guilt or innocence of the accused.

There is a very considerable body of intergovernmental,³³⁷ gov-

³³³ In the opening speech the military judge in a Spanish trial acknowledged the presence of international observers. Aronstein, *supra* note 312.

³³⁴ Spain — Madlener/ICJ (1973), *supra* note 325, at 4; Spain — Ziegler-Muller/FIDH (1976), *supra* note 174.

³³⁵ AI, AMNESTY INTERNATIONAL REPORT 1975-1976, at 168 (1976).

³³⁶ See Iran — Heldman/AI (1970), *supra* note 67; cf. Morocco — Hincker/FIDH, *supra* note 216, at 9 (reporter, not an observer, was deprived of his notes).

³³⁷ See generally Foster, *Fact-finding and the World Court*, in 7 CAN. Y.B. INT'L LAW 150 (1969); Franck & Fairley, *Procedural Due Process in Human Rights Fact Finding by International Agencies*, 74 AM. J. INT'L L. 308 (1980); Franck & Cherkis, *The Problem of Fact Finding in Interna-*

ernmental,³³⁸ and nongovernmental³³⁹ experience as to fact-finding procedures which an observer might find useful. Of course, the observer usually works alone with neither the need nor the ability to establish formal fact-finding procedures such as most international tribunals have used. The trial itself is a source of formally presented evidence, though the observer cannot personally question the witnesses in open court, nor assure the fairness of the fact-finding process. Instead, the observer must rely upon the contending parties to establish the facts at trial and supplement them as necessary with interviews outside the courtroom.³⁴⁰

Most sending organizations do not expect their observers to base their reports only on evidence adduced at trial. Where possible the observer should observe the proceedings while conducting a parallel, informal fact-finding inquiry.³⁴¹ Several observers have undertaken parallel investigations to verify the evidence offered at trial because they found the information presented in the courtroom to be incomplete. An observer may want to conduct an independent investiga-

tional Disputes, 18 CASE WESTERN RES. L. REV. 1483 (1967); Ermacora, *International Enquiry Commissions in the Field of Human Rights*, 1 HUMAN RIGHTS J. 180 (1968); Report of the Secretary-General on Methods of Fact-finding, 19 U.N. GAOR, U.N. Doc. A/5694 (1964) [hereinafter cited as Secretary-General's Report]; N. BAR-YAACOV, *THE HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY* (1974); [hereinafter cited as BAR-YAACOV]; W. SHORE, *FACT-FINDING IN THE MAINTENANCE OF INTERNATIONAL PEACE* (1970) [hereinafter cited as SHORE]; Norris, *Observations "in loco": Practice and Procedures of the Inter-American Commission on Human Rights*, 15 TEXAS J. INT'L L. 46 (1980); van Boven, *Fact-Finding in the Field of Human Rights*, 3 ISRAEL Y.B. HUMAN RIGHTS 93 (1973).

³³⁸ See Weissbrodt, *Human Rights Legislation and United States Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231, 238-39 n.29 (1977).

³³⁹ Weissbrodt, *The Role of International Nongovernmental Organizations in the Implementation of Human Rights*, 12 TEX. INT'L L.J. 293 (1977); Weissbrodt & McCarthy, *Human Rights Fact-finding by Nongovernmental Organizations*, 22 VA. J. INT'L L. 1 (1981).

³⁴⁰ In order to get a full idea of the circumstances surrounding the trial, an I.C.J. observer met with ex-detainees, those restricted by banning orders, concerned university professors, members of the legal profession, diplomats, and participants in the trial. S. Africa — Morand/ICJ (1975), *supra* note 182, at 1-2. Observers have occasionally encountered difficulties in obtaining interviews with defendants who are still in detention during the trial. See, e.g., S. Africa — Thornberry/AI (1974), *supra* note 226, at 1. Obviously, observers must use good judgment as to which interviews should be requested and as to what are acceptable circumstances for interviews with a prisoner. An I.C.J. observer was permitted to interview the defendant only in the presence of a government translator and the prosecutor. At the outset the observer successfully insisted that the interview not be recorded and told the defendant he need not answer any questions under such circumstances. S. Korea — Sanguinetti/ICJ (1972), *supra* note 170, at 8. Despite the obvious limits of such an interview, the observer was able to obtain "first hand impressions of the condition of the accused and his treatment in prison." At minimum it is useful to attempt to speak with the defendant and to assure that he knows of the observer's presence. See S. Africa — Velleman/ICJ (1977), *supra* note 212, at 1.

³⁴¹ One observer found that the defense lawyers in an Iranian proceeding were retired members of the military appointed by the court. See Iran — Wrobel/AI (1977), *supra* note 271, at 12, 28.

tion if she suspects that the judge is prejudiced or that the defense lawyers are under governmental pressure not to pursue a vigorous defense.³⁴² When an Amnesty International observer was sent to the North Dakota trial at which Leonard Peltier was accused of killing two F.B.I. agents, the observer received separate factual presentations from the prosecutor, the defense attorneys, and friends of the defendant.³⁴³ The trial judge also spent considerable time with the observer explaining the trial and the court's rulings. Finally, it should be kept in mind that defense counsel may have tactical reasons for not presenting in court all evidence of the defendant's innocence.

M. *Evidentiary Standards*

Traditionally, international fact-finding has not been restricted by rules regarding the admissibility of evidence which arise in common law courts.³⁴⁴ Common law rules for the exclusion of evidence are ordinarily designed to narrow the issues presented to the jury.³⁴⁵ Since trial observers are selected for their legal and subject-matter expertise, jury-oriented evidentiary rules are not necessary. Exclusionary rules also discourage government misconduct in gathering evidence — particularly in criminal trials.³⁴⁶ This problem applies rarely, if ever, to fact-finding observers. In addition, courts also use exclusionary rules to promote the reliability and integrity of the fact-finding process.³⁴⁷ Instead of using the exclusionary approach, inter-

³⁴² One observer was so hounded by Savak agents that contacts with opposition groups would subject them to a grave risk of retribution. *See* Iran — Heldmann/AI (1970), *supra* note 67. The observer in such circumstances should probably be limited to trial observation and contacts with government officials.

³⁴³ *See* United States — Bari/AI (1977), *supra* note 228, at 3, 47.

³⁴⁴ *See generally* D. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 1-29, 176-96, 366-69 (rev. ed. 1975) [hereinafter cited as SANDIFER]. "[T]he restrictions upon admissibility of evidence sometimes encountered in municipal procedure (and connected with the system of jury trial) have no place in international adjudication, where the relevance of facts and the value of evidence tending to establish facts are left to the entire appreciation of the Court." *Id.* at 179-80 (quoting S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 556-57 (1965)); SHORE, *supra* note 337, at 124-25.

³⁴⁵ *See* 1 J. WIGMORE, EVIDENCE §§ 2, 29a (3d ed. 1940); SANDIFER, *supra* note 344, at 176-78.

³⁴⁶ *See* C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 164-165 (2d ed. 1972); *see, e.g.*, Mapp v. Ohio, 367 U.S. 643, 657-60 (1961) (evidence obtained in violation of the fourth and fourteenth amendments will be excluded from state courts); Benanti v. United States, 355 U.S. 96, 100 (1957) (evidence obtained by state or federal agents in violation of the Federal Communications Act is inadmissible in federal court).

³⁴⁷ *See generally* C. MCCORMICK, *supra* note 346, §§ 164-166. The problem of whether evidence would be inadmissible by reason of its means of procurement was evidently posed to the Commission of Inquiry of Iran, when it was presented with evidence captured in the

national fact-finders have been disposed to consider all available evidence but to weigh it very carefully.³⁴⁸ International fact-finders also rely on a number of techniques to assure the reliability of the fact-finding process, such as cross-checking information from different sources, carefully questioning witnesses, and articulating burdens of proof. Using these techniques, international observers should seek the broadest possible range of raw evidence.

Observer inquiries outside the trial resemble interviews more than adjudicative hearings. The effectiveness of direct examination by the observer varies with the preparedness, incisiveness, and skill of the questioner.³⁴⁹ In some ways observers conduct themselves like civil law *juges d'instruction*.³⁵⁰ The observer need not demonstrate facts to some independent body, such as a judge or jury. The questioner both poses the inquiries and also analyzes the responses. Hence, he can extract meaningful information through polite and sometimes indirect questioning. Points need not be driven home. On some more formal occasions — interviews with governmental representatives, for example — observers may need to use more forceful questioning. But ordinarily polite, tactful, and carefully prepared questions produce reliable fact-finding.

The most commonly used method of verifying human rights information is the cross-checking of evidence from different sources. Often relying on indirect evidence, and faced with unreliable or politically motivated informants, the observer should look for corroborative data from independent sources.

Observers occasionally receive government statements which partially deny or inferentially admit human rights violations. Observers usually construe such admissions strictly against the government. Observers must also be aware of inconsistencies in a government's position. For example, a representative of Argentina's Ministry of the Interior denied that his government used electric prods to torture

United States Embassy and with the possibility of hearing testimony from American diplomatic hostages. *See also* U.N. Press Release IR/11, March 3, 1980.

³⁴⁸ *See* SANDIFER, *supra* note 344, at 20, 180.

³⁴⁹ Interviews should be free of governmental witnesses. An AI observer talked to the defense attorney in the presence of the Registrar of the Special General Court Martial in Ethiopia; the observer probably failed to obtain the candid views of this attorney. *See* Ethiopia — AI (1975), *supra* note 274, at 7. Obviously, no rigid rules can be established as to conditions for interviews. Ethiopia was and remains a country of such fear that an attorney would probably feel safer speaking to an observer in the presence of an official, so that it would be *known* that he had said nothing critical and thus he would survive to see another trial.

³⁵⁰ *Cf.* Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570, 1571 (1978) (suggesting a conflict between the concept of the *juge d'instruction* and actual practice).

prisoners; yet he displayed a working familiarity with these instruments.³⁵¹

The demeanor of a witness at trial may lend insight into the veracity of her testimony, or may merely reflect the witness's nervous disposition. Observers who have personally interviewed the witness can better assess the reliability of the testimony given and will have better insight into the validity of the witness's statements.³⁵²

Finally, the burden of proof serves a very significant role in determining the usefulness of independent factual findings. Observers may discover evidence of varying weight and persuasiveness. In drafting their final reports, the standard for significant conclusions must be clearly defined and consistently applied.

N. *Scope of Mission — Observer Instructions*

In performing a fact-finding role, the observer must consider the scope of the mission as established by the sending organization. Some observers are instructed to consider the fairness of the proceedings,³⁵³ others are asked to determine the facts supporting criminal charges,³⁵⁴ discover the pretrial treatment of the defendant,³⁵⁵ or consider how the trial reflects the general state of human rights in the country.³⁵⁶ For example, the principal purpose of the International Commission of Jurists in sending an observer to the trial of former dictator Macias was to document the violation of human rights under his regime,³⁵⁷ although the observer did also report upon the fairness of the Macias trial itself.³⁵⁸

³⁵¹ See, e.g., AI, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO ARGENTINA 6-15 NOVEMBER 1976, at 53 (1977).

³⁵² In one South African trial the observers independently assessed the demeanor of the prosecution's star witness, a security police officer, and found him to be thoroughly unreliable and vicious. See S. Africa — Napley (1977), *supra* note 281, at 9.

³⁵³ "A detailed report by an observer (*of undeniable integrity and judicial standing*) may bring to the light errors in judicial procedure or blatant bias on the part of the court." AI ANNUAL REPORT 1965-66, at 8-9 (1966).

³⁵⁴ Amnesty International observers form a judgment as to whether the defendant has been imprisoned for political, racial, religious, or similar reasons and has neither done nor advocated violence, so as to qualify for AI adoption as a prisoner of conscience. AI, AMNESTY INTERNATIONAL HANDBOOK 9 (1977). See, e.g., Amnesty International, The Casablanca Trials January/February 1977, at 2 (Mar. 1977) [hereinafter cited as Morocco — Frontistes/Hoss/AI (1977)].

³⁵⁵ See, e.g., Greece — Bourgaux/AIJD (1973), *supra* note 159, at 3.

³⁵⁶ See, e.g., Malawi — Kellock/AI (1968), *supra* note 226. AI's principal purpose in sending Kellock to a trial in Malawi appeared to be his monitoring of the results of a recent report on political detention. See also Egypt — Ersoy/AI, *supra* note 293, at 1 (observer was asked to collect data on trials, arrests, oppression of opposition parties, etc.).

³⁵⁷ EQUATORIAL GUINEA — TRIAL OF MACIAS, *supra* note 32.

³⁵⁸ *Id.* at 60-61.

Observers usually receive from the sending organization a formal letter of introduction or Order of Mission which they can show to the court or government where the trial is held.³⁵⁹ Most Orders of Mission state that the observer is expected to report upon the fairness of a particular trial, but observers may interpret these instructions narrowly³⁶⁰ or broadly enough to cover all the surrounding circumstances of the trial.³⁶¹ If the observer interprets her Order of Mission too narrowly, she may render an inadequate report. For example, several observers of South African trials proclaimed the proceedings fair because they looked only at the court procedure and failed to consider the draconian, overbroad, and ultimately racist substantive laws being enforced.³⁶² Most observers of South African trials take a broader perspective.³⁶³

Ambiguous Orders of Mission should not confuse the observers. These formal documents are designed more to induce the host government to cooperate with the mission than to outline the sending organization's needs. The broader needs will either be self-evident or communicated informally to the observer.

V. TRIAL OBSERVER REPORTS, RECOMMENDATIONS, AND IMPACT

A. *Timing and Substance of Reports*

After observation, the principal responsibility of the observer is to produce a report promptly. If the observer's mission is to be effective, the sending organization must receive a report while the prosecuting government is still sensitive to authoritative, independent criticism and to public opinion.³⁶⁴

Almost all observers are busy lawyers whose ordinary professional

³⁵⁹ See, e.g., Greece — Grobet (1973), *supra* note 284 (I.C.J. letter of Jan. 12, 1973).

³⁶⁰ See, e.g., Bulgaria — Spetter Trial (1974), *supra* note 68.

³⁶¹ While the Moroccan trial procedures were open and fair, the observers could not ignore the repressive laws of the country and the abusive conditions of pretrial detention revealed by the accused. See Morocco — Hincker/FIDH (1976), *supra* note 216, at 8-9.

³⁶² "My impression of the proceedings so far is that, within the limitations imposed by the governing laws, the summary nature of proceedings, and the prevailing local political conditions (which three limitations are substantial), they have been fairly conducted, though I have some minor reservations." South Africa — Thornberry/AI/LCCRUL (1974), *supra* note 226, at 2.

³⁶³ See, e.g., C. Morand, Report on the SASO/BPC Trial, at 4 (Dec. 16, 1975) (unpublished report to the International Commission of Jurists); South Africa — Morand/ICJ (1975), *supra* note 182.

³⁶⁴ In one case the mission ended January 18, and by January 21 the I.C.J. had already issued a press release, which was necessary to generate international pressure on Morocco to refrain from carrying out the death sentence meted out on the 18th. Morocco — Suckow/ICJ (1974), *supra* note 201, at 2.

responsibilities once again absorb their energies unless they complete their reports quickly upon returning home. While a good observer report has a number of qualities, promptness is the most vital.³⁶⁵

To the extent that time permits, observers should include the following information in their reports: (1) the instructions of the sending organization and any terms of reference;³⁶⁶ (2) the legal, historical, and political setting of the case;³⁶⁷ (3) the facts of the case as revealed at trial and independently verified by the observer;³⁶⁸ (4) the charges, applicable laws, pretrial procedures, trial, judgment (if any), and subsequent proceedings;³⁶⁹ (5) a description of the condi-

³⁶⁵ Where it is geographically and financially possible, non-governmental organizations should also consider asking the observer to report orally to the secretariat, so that they can receive a rapid account of the mission. Upon return from an I.C.J. mission to South Africa in 1975, the observer was debriefed before he prepared his report. *S. Africa — Archer/ICJ* (1975), *supra* note 76, at 11. Unfortunately, observers often come from distant countries and do not pass close to the secretariat on their missions so that they can be debriefed.

³⁶⁶ In a typical observer report the observer begins with an outline of the mission's mandate, *e.g.*, to establish contacts, collect information, observe the trial, interview the accused, get a private doctor to examine the accused, inquire into the conditions of detention, and evaluate the findings under international human rights standards. *See S. Africa — Thornberry/AI* (1974), *supra* note 226, at 1. The report's introduction also often indicates the name of the observer, a summary of the observer's qualifications, the identity of the sending organization, the name of the defendant, the charge against the defendant, the date of the mission, and a list of the contents of the remainder of the report.

³⁶⁷ In reporting to the I.C.J. on his mission to a Turkish trial, the observer begins with a brief synopsis of the recent political, economic, and social history of Turkey. *See Turkey — Simon/ICJ* (1980), *supra* note 174, at 53-55; *see also S. Africa — Gardiner/ICJ* (1957), *supra* note 244, at 43-47. Also, in some cases a report would not be complete without a biographical sketch of the defendant, which may illuminate the political nature of the proceedings. *Aronstein, supra* note 312, at 37-38. There may be some risk that an observer's comments on the economic, social, and political situation may be outside her area of expertise and may appear to politicize the remainder of the report. Hence, some caution may be necessary — particularly if the observer's background comments are to be published.

³⁶⁸ *L. Kakula & M. Kamuwanga, Report by International Observers at Leonard Peltier's Trial, January 18-27, 1978* (unpublished report to Amnesty International).

³⁶⁹ One observer reported the essentials: the name of the trial; the court; the place of trial; the dates of trial; the accused; the charge; the law violated; the order of testimony; the conduct of the prosecutor, judge, and defense counsel; the verdict, the sentence, and the further procedures available. *See Greece: Justice in Blinkers*, 1 INT'L COMM'N JUR. REV. 6, 7 (1969) [hereinafter cited as *Greece — Achard/ICJ* (1968)]. The observer might usefully describe the courtroom and the nature of audience, including any other foreign observers, police agents, etc. *See, e.g., Greece — Grober/ICJ* (1973), *supra* note 284.

In one complicated case with numerous defendants the observer appended a very useful chart to his report with the names of the defendants, their age, marital status, profession, defense counsel, original sentence, revised sentence on appeal, and present prison status. *S. Suckow, Report on Observer Mission — Trial in Madrid of A. Fina Sanglas and M. Aviles Vila and 8 Workers of SEAT, March 4-5, 1975* (Mar. 13, 1975) (unpublished report to the International Commission of Jurists). When reporting on another case involving 15 defendants, the observer prepared a lengthy appendix which fully described each defendant, the charges against each, the substance of testimony for and against each defendant, the verdict for each, and the sentence for those convicted. *Greece — Vournas/ILRM* (1972), *supra* note 221 app., at a-1 to a-7.

Observers do not report every factual dispute or procedural issue in the proceeding, but

tions of confinement and their impact on the mental and physical condition of the defendant(s);³⁷⁰ (6) an evaluation of the fairness of the proceedings, the applicable laws, and the treatment of the defendant(s) according to national law and international human rights standards;³⁷¹ and (7) a conclusion describing any significant problems the observer noted.³⁷²

limit their report to the critical problems which were relevant to the fairness of the proceedings, based on their own observations, legal documents, interviews with participants, etc. *See, e.g.*, Pakistan — Williams/ICJ (1978), *supra* note 158, at 7; India — Sheppard/ICJ (1976), *supra* note 246.

³⁷⁰ One important function of the observer is to report on the physical and mental condition of the defendant — particularly where there is a possibility of torture or bad prison conditions. Such information simply cannot be gathered at long distance and thus becomes an important duty of the trial observer. *See* S. Africa — Velleman/ICJ (1977), *supra* note 212, at 5 (defendant's condition good); Iran — Ducreaux/AIJD (1965), *supra* note 188, at 2; Greece — Gardiner/AI (1972), *supra* note 279, at 4. Evidence of torture may also be relevant to the fairness of trial procedure if the court refuses to hear any evidence that confessions were produced by torture, as occurred in Morocco. Morocco — Woesner/AI/ICJ (1973), *supra* note 217, at 2.

³⁷¹ Observers often draw conclusions about the vagueness, misapplication, or injustice of the laws under which the defendant is charged. *See, e.g.*, Greece — Achard/ICJ (1968), *supra* note 369, at 8–9. One I.C.J. observer was careful to comment on the favorable as well as the unfavorable aspects of the trial, so as to produce an apparently balanced, objective report. Morocco — Poulsson/ICJ (1964), *supra* note 285, at 29. Another observer prepared 10 pages of well-written findings on the four principal issues of fairness of the proceedings. India — Sheppard/ICJ (1976), *supra* note 246, at 21–30. The observer's role is not, however, to criticize a judge's evidentiary or procedural rulings that could have gone either way. Indonesia — Dowd/ICJ (1974), *supra* note 209, at 13–14. But instead, the observer's purpose is to assess the fairness of the proceedings under basic international standards of fairness, such as those provided by the International Bill of Human Rights. *See, e.g., id.* One experienced observer's approach was to provide a description of the procedures for obtaining admission to the trial, the courtroom, the general conduct of the proceedings, the charges, and the evidence (in some detail, including verbatim testimony to highlight evidentiary shortcomings). The report then commented on the procedural fairness (ability to present the case fully to the court), procedural shortcomings, contextual fairness (were the laws under which the accused were prosecuted properly clear and respectful of the right to associate freely?) and whether the judgment was based on evidence proffered by the defense (or was it ignored?). N. MacDermot, Report and Comments on Proceedings for the Dissolution of Two Greek Associations in Athens, 16 May 1972 (June 1972) (unpublished report to the International Commission of Jurists) [hereinafter cited as Greece — MacDermot/ICJ (1972)]. The observer notes that the trial was procedurally fair in the sense that the accused organizations were given the opportunity to defend their right to exist. Further, the President of the Court "was at pains to conduct the trial fairly." *Id.* at 9. Still, the observer goes on to note three factors which most alarmingly indicated the general breakdown of the rule of law in Greece. Further, the observer delivers biting criticism of the trial as a facade for authoritarian heavy-handedness. *Id.* at 9–10. By way of comparison, military observers must prepare a factual description of the trial, including failures to provide procedural safeguards, and must conclude whether the accused received a fair trial under the circumstances. Williams Thesis, *supra* note 162, at 47–48.

³⁷² One observer ably summarized the major concerns about the procedural fairness and fairness-in-context of the trial: (a) the trial was a blatantly political one; (b) the law under which the accused were charged was hopelessly vague and, besides, it established crimes of ideology; (c) defendants were not given the required benefit of the doubt, nor was the proof offered at trial of probative weight; (d) there was not any evidence introduced to prove any plot among the defendants. Iran — Ducreaux/AIJD (1965), *supra* note 188, at 4–5. Also, for

The report might append (1) a copy of the Order of Mission; (2) copies of the relevant procedural rules, court decisions, and laws;³⁷³ (3) copies of court documents, including transcripts, pretrial transcripts, charge sheets, and judgments; (4) a description of the observer's investigative methods and copies of materials studied;³⁷⁴ (5) a list of individuals interviewed (to the extent that they will not be endangered by being named); (6) sensitive material (such as the names, addresses, and telephone numbers of contacts who might be endangered by public disclosure, but about whom the organization should know); (7) copies of any newspaper articles regarding the trial or the observer's presence;³⁷⁵ (8) additional information not strictly within the observer's mission (such as general information regarding political detainees, torture, other trials, or recent laws);³⁷⁶ and (9) a list of practical problems encountered by the observer that might assist future observers in the same country.³⁷⁷

Observers are not ordinarily requested to make recommendations to the government concerned or to the sending organization, but some observers have included recommendations to alleviate defects in trial procedures and suggestions as to how the sending organization should proceed in the matter.³⁷⁸

Traditionally international fact-finders uncovered facts, but did

an excellent report and conclusion, see Greece — Grobet/ICJ (1973), *supra* note 284; Morocco — Suckow/ICJ (1974), *supra* note 201, at 7; S. Africa — Pollak (1978), *supra* note 178.

³⁷³ See, e.g., Spain — Suckow/ICJ (1975), *supra* note 77, at app. (the most pertinent provisions of the Spanish Penal Code appended); Morocco — Hincker/FIDH (1976), *supra* note 216 (appended copies of relevant provisions of constitution and penal code); Indonesia — Dowd/ICJ (1974), *supra* note 209, at 7 (copy of law under which the defendant was charged, with English translation).

³⁷⁴ One I.C.J. observer listed all the materials he had studied before, during, and after the trial. Some of the more important material might also be copied in an appendix to the report. Pakistan — Williams/ICJ (1978), *supra* note 158, at 2-3.

³⁷⁵ In assessing the fairness of the proceeding and the potential of the government to be affected by the criticisms, the observer should consider the accuracy of local press coverage about the trial. See, e.g., Tunisia — Hassemer/AI/ILHR (1977), *supra* note 182, at 4; S. Africa — Napley (1977), *supra* note 281, at 1; Indonesia — Dowd/ICJ (1974), *supra* note 209; *S. Korean Military Using Trial, Press to Discredit Kim*, Wash. Post, Aug. 22, 1980, at A22, col. 1. The sending organization would be assisted in assessing the success of the mission if articles mentioning the mission are appended or at least properly cited. See E. Martin-Achard, *Le Procès de Anastasios Minis et Stephanos Pantelakis devant un Tribunal Militaire Spécial à Athènes*, 19 et 20 février 1973 (unpublished report to the International Commission of Jurists) (copies enclosed) [hereinafter cited as Greece — Martin-Achard (1973)]; Morocco — Jemoli/AI (1976), *supra* note 216 (newspaper articles mentioned but not properly cited).

³⁷⁶ One observer not only appended a list of the forthcoming trials of interest to the organization, but also provided a collection of photographs of the people, places, and things observed which would be indispensable for later publicity about the trial. S. Africa — Thornberry/AI (1974), *supra* note 226; see also Taiwan — Seymour/AI, *supra* note 78.

³⁷⁷ India — Sheppard/ICJ (1976), *supra* note 246.

³⁷⁸ See, e.g., Greece — Gardiner/AI (1972), *supra* note 279, at 5.

not make recommendations.³⁷⁹ Their inquiry was limited in order to maintain the distinction between fact-finders and arbitral tribunals that make political judgments. Slowly this separation has broken down as more observers and other international fact-finders have issued reports and recommendations.³⁸⁰

Amnesty International publishes observer reports containing recommendations to the government concerned. These are not generally the conclusions of the observer, but Amnesty International's recommendations based upon the observer's findings.³⁸¹ The generally prevailing practice of separating observer reports from the human rights campaign activities of their sponsors serves to maintain the specialized, impartial, fact-finding role of observers and should be continued.

Nongovernmental organizations sometimes have difficulty deciding when to issue the report. In one case, the International Commission of Jurists issued its mission report before the trial ended, because it seemed that the trial would drag on for a long time.³⁸² Although organizations seek to promote fairness, such an early report may be deemed to interfere in the trial process. Also, it is hard to assess the fairness of a proceeding before knowing the results.

More commonly, trial observer reports are issued promptly after trial, even though appellate review or clemency proceedings are still available. Appellate courts are considered to be better able to deal with the political pressures created by such reports. And, indeed, the reports may properly point out errors which ought to be the basis for appellate reversal or clemency.

The other major question concerning dissemination of observer reports is whether reports should be submitted to the concerned government for comment or rebuttal before release to the public. One reason for following this procedure is that the government should be given an opportunity to make any suggested changes. Another is that the government's failure to respond to adverse conclusions helps support the report's findings.

Organizations regularly submit their findings to and solicit evidence from the concerned state. The major drawbacks to this procedure have been the delay in receiving responses from some

³⁷⁹ BAR-YAACOV, *supra* note 337, at 105.

³⁸⁰ *Id.* at 109-246; Leurdijk, *Fact-Finding: Its Place in International Law and International Politics*, 14 NETHERLANDS INT'L L. REV. 141, 154-58 (1967); Secretary-General's Report, *supra* note 337, at 23-33, 60-64 (1964); SHORE, *supra* note 337, at 15-22, 32-36.

³⁸¹ See, e.g., AI NICARAGUA REPORT, *supra* note 73, at 38-40.

³⁸² S. Africa — Gardiner/ICJ (1957), *supra* note 244.

governments and the refusal of other governments even to respond. Organizations should set definite time limits for responses and publish their reports immediately upon any public comment by the concerned government.

B. Fairness Standards

There are several possible standards by which an observer might judge the fairness of a trial. The observer can look to (a) the laws of the country where the trial is held, (b) human rights treaties to which the nation is a party, or (c) other prevailing international norms.

Far too often, observers fail to specify the standards they use to draw their conclusions.³⁸³ At other times observers explain their conclusions with vague references to natural justice.³⁸⁴ Some observers rely upon an unsubstantiated opinion of what the laws of most coun-

³⁸³ See, e.g., Tunisia — Hassemer/AI/ILHR, *supra* note 182, at 5.

³⁸⁴ E.g., India — Sheppard/ICJ (1976), *supra* note 246, at 3-4. The concept of natural justice derives from the broader and ancient doctrine of Natural Law. Philosophers and jurists have long posited the existence of a law higher than the positive law of sovereign states which no state may transgress. For descriptions of the historic development, decline, and resurgence of the doctrine from Socrates through Thomas Aquinas, Locke, and Kant, see, e.g., THE NATURAL LAW READER 47-108 (B. Brown ed. 1960); F. ETEROVICH, APPROACHES TO NATURAL LAW FROM PLATO TO KANT (1972); Y. SIMON, THE TRADITION OF NATURAL LAW 16-40 (1965).

International jurist H. Lauterpacht asserts that the modern development of international law is founded on natural law theory. "Grotius called in the law of nature, to which he gave fresh vitality and authority, in order to found the modern system of international law. But much of the new vigour and dignity which he imparted to the law of nature came from the fact that it was made the basis for that so much needed law governing the relations of sovereign states. International law, by thus endowing the law of nature with a great historic function, gave it a new lease on life and a new significance." Lauterpacht, *The Law of Nations, the Law of Nature and the Rights of Man* in PAMPHLETS ON THE PHILOSOPHY OF LAW NO. 23, at 21 (1942).

The concept of inalienable human rights derives in substantial part from the notion of natural law. The Universal Declaration of Human Rights is said to be the "common formulation of practical conclusions about man and the various rights possessed by man" that have evolved from the ancient ideas of natural and international law. J. MARITAIN, THE MEANING OF HUMAN RIGHTS 6-7 (1949). For further exposition on the relations of natural law to human rights, see R. TUCK, NATURAL RIGHTS THEORIES (1979); Midgley, *Natural Law and Fundamental Rights*, 21 AM. J. JURIS. 144 (1976); Murray, *The Natural Law in GREAT EXPRESSIONS OF HUMAN RIGHTS* 69 (R. MacIver ed. 1950).

One fundamental human right is the right to fair treatment before the law. The English phrase "natural justice" and its American counterpart "due process" express the Anglo-American conception of procedural fairness. Newman, *Natural Justice, Due Process and the New International Covenants on Human Rights: Prospectus*, 1967 PUB. L. 274, 277 (1967); see also H. WADE, ADMINISTRATIVE LAW 171-218 (3d ed. 1971) (natural justice); Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215 (1961) (due process). Both phrases have escaped precise definition.

English scholars have distilled the requirements of natural justice into two elements: (1) a man must not be the judge of his own case, and (2) both sides must be heard. D. HEWITT, NATURAL JUSTICE 12 (1972). Other principles often cited as elements of natural justice, e.g., that the parties must have timely notice, be represented by counsel, and be judg-

tries would provide on a certain issue,³⁸⁵ or adopt their own countries' standards.³⁸⁶ In some cases a transnational comparison is

ed by an impartial tribunal, are said to derive from the two essential rules. H. MARSHALL, *NATURAL JUSTICE* 5 (1959).

While the English legal system has moved away from the natural law source of natural justice toward parliamentary dictates of procedural fairness, American courts have relied on natural law concepts in fashioning the requirements of the due process clause. Compare Miller, *The Forest of Due Process Law: The American Constitutional Tradition* in *DUE PROCESS NOMOS XVIII* 3 (1977) with Marshall, *Due Process in England* in *DUE PROCESS NOMOS XVIII* 69 (1977). The American judiciary has avoided a clear-cut formulation of due process requirements and has developed a flexible standard that calls for considerations of fairness and a weighing of competing interests. Justice Frankfurter's statement in *Hannah v. Larche* exemplifies the American approach: "Whether the scheme satisfies those strivings which due process guarantees, must be judged in the light of reason drawn from considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest . . . as against the hazards or hardship to the individual that the attacked procedure would entail." 363 U.S. 420, 487 (1960) (Frankfurter, J., concurring).

Professor and former Justice Frank Newman has proposed an interpretation of the fair hearing provisions of the international human rights covenants that simultaneously utilizes and clarifies the norms of natural justice and due process. Newman, *Natural Justice, Due Process and the New International Covenants on Human Rights: Prospectus*, 1967 PUB. L. 274 (1967). He concludes: "Overall, whenever a person's rights and obligations are to be governmentally adjudicated he is entitled to a fair hearing by a competent, independent and impartial tribunal established by law." *Id.* at 310. To help in assessing whether a hearing is fair he sets out the following principles proposed by the International Commission of Jurists: "(1) adequate notice to the interested parties of the nature and purpose of the proceedings; (2) adequate opportunity for them to prepare the case, including access to relevant data; (3) their right to be heard, and adequate opportunity for them to present arguments and evidence, and to meet opposing arguments and evidence; (4) their right to be represented by counsel or another qualified person; (5) adequate notice to them of the decision and of the reasons therefor; (6) their right of recourse to a higher administrative authority or to a court." INT'L COMM'N OF JUR., *THE RULE OF LAW AND HUMAN RIGHTS* 21 (1966).

³⁸⁵ See, e.g., Spain — Madlener/ICJ (1973), *supra* note 325, at 10; S. Africa — Morand/ICJ (1975), *supra* note 182, at 2; cf. Maki, *General Principles of Human Rights Law Recognized by all Nations: Freedom from Arbitrary Arrest and Detention*, 10 CAL. W. INT'L L.J. 272, 282-83 (1980) (determining general principles of law by comparing both the law and the practice of the countries).

³⁸⁶ United States military observers have attempted rather unsuccessfully to use U.S. constitutional standards for judging foreign trials of American military personnel. In acceding to the N.A.T.O. Status of Forces Agreement, the U.S. Senate permitted U.S. military personnel to be tried in a N.A.T.O. country only if the country gives procedural safeguards which are equal to or better than those available in the U.S. Because it is almost impossible to compare the fairness of civil law and the common law countries by taking each right and asking whether it has been observed in each system, this Senate instruction has not really been followed. The military services have prepared "country law reports" which attempt the impossible task of comparing the U.S. criminal justice system with the procedures of each N.A.T.O. nation (as well as other countries where significant numbers of military personnel are stationed). These country law reports provide a very useful introduction to the criminal law system of other countries from an American perspective, but they invariably state that the fairness of foreign legal systems is substantially equivalent to American rights, so as to avoid offending other nations.

Faced with the impossible Senate-imposed standard, or with the equally impossible requirements of Department of Defense Directive 5525.1 of January 20, 1966, which follows the Senate standard, most U.S. military observers apparently develop their own norms which essentially determine if the U.S. citizen received the same rights as local nationals or whether under all the circumstances the accused received a fair trial. Perhaps if these military observ-

appropriate. For example, if a leading member of the Paris Bar is observing a trial in the former French colony of the Ivory Coast, he may well use French legal standards, since the lawyers and judges are probably attempting to follow the norms and procedures of French law.³⁸⁷ Far too often, however, observers may unconsciously use the customs of their own courts without adequately considering the propriety of the comparison. It may be significant that the laws of most nations forbid a certain practice at trial, but very few observers possess the expertise or take the time to make rigorous transnational comparisons.

Observers may discover that the government disobeys its own constitution, statutes, or judicial decisions.³⁸⁸ Ideally, an observer should know the jurisprudence of the country or consult local experts on problems of domestic law.³⁸⁹

Observers can more confidently refer to the human rights covenants and other treaties to which the nation under scrutiny is a party.³⁹⁰ For example, in reporting upon an Iranian trial held in 1977, an Amnesty International observer made reference to the International Covenant on Civil and Political Rights, which Iran had previously ratified.³⁹¹ Similarly, an observer for the International Commission of Jurists reporting on a 1968 trial in Greece referred to the unheeded provisions of the European Convention on Human Rights to which Greece was then a party.³⁹²

Most nongovernmental observers refer to the International Bill of Human Rights³⁹³ or the Universal Declaration of Human Rights,³⁹⁴ because of their preeminence in defining human rights standards.³⁹⁵

ers were aware of the standards set forth in the International Bill of Rights, they would have a more generally applicable norm to apply, which might even conform more closely to the Senate's intention. See notes 5, 6, 7, 8 *supra*; see also R. ELLERT, NATO 'FAIR TRIAL' SAFEGUARDS 74-75 (1963).

³⁸⁷ See Ivory Coast — Picard/AI (1974), *supra* note 221.

³⁸⁸ See, e.g., Spain — Aronstein/BLDHR (1972), *supra* note 207, at 1; AMNESTY INTERNATIONAL, TUNISIA IMPRISONMENT OF TRADE UNIONISTS IN 1978 (1978) [hereinafter cited as TUNISIA — RAY/AI (1978)]; S. Korea — Sanguinetti/ICJ (1972), *supra* note 170, at 3.

³⁸⁹ *The Trial of Professor Galarza*, *supra* note 320.

³⁹⁰ See note 113 *supra*.

³⁹¹ *U.S. Policy on Human Rights and Military Assistance — Iran: Hearings Before the Subcomm. on Int'l Organizations of the House Comm. on Int'l Relations*, 95th Cong., 2d Sess. 216-218 (Feb. 28, 1978) (testimony of Brian Wrobel) [hereinafter cited as Iran — Wrobel/AI (1977)].

³⁹² See Greece — Ellman/ICJ (1968), *supra* note 31, at app. 1; see also, e.g., Turkey — Simon/ICJ (1980), *supra* note 174, at 64.

³⁹³ See note 113, *supra*; see, e.g., Morocco — Hincker/FIDH (1976), *supra* note 216, at 9.

³⁹⁴ See note 87, *supra*; see, e.g., Morocco — Poulsson/ICJ (1964), *supra* note 285.

³⁹⁵ See Buergenthal, *Codification and Implementation of International Human Rights*, in HUMAN DIGNITY, THE INTERNATIONALIZATION OF HUMAN RIGHTS 15, 17 (A. Henkin ed. 1979); Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*,

Article 10 of the Universal Declaration states: "Everyone is entitled in full equality to a fair and public hearing by an independent tribunal, in the determination of his rights and obligations and of any criminal charge against him."³⁹⁶ Article 11 provides for the presumption of innocence, public trial, "all the guarantees necessary for [one's] defense,"³⁹⁷ and the right to be free from retroactive punishment or penalties. Other provisions of the Universal Declaration — for example, as to arbitrary arrest,³⁹⁸ the right to an effective remedy or legal redress,³⁹⁹ the right to be free from torture,⁴⁰⁰ the right to security of person,⁴⁰¹ and privacy⁴⁰² — may be relevant in particular cases.

The International Covenant on Civil and Political Rights further elaborates the rights identified in the Universal Declaration, whether or not the nation in question has ratified the Covenant.⁴⁰³ For example, Article 14 of the Covenant specifies minimum guarantees for those facing criminal charges.⁴⁰⁴ However, the rights prescribed by

in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 28-37 (B. Ramcharan ed. 1979); Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 46 (1978).

The corps of invited observers to the trial of the mercenaries in Angola surprisingly attempted to establish their own seven basic principles of fair trial procedures without apparent reference to the International Bill of Human Rights. Lockwood, *Report on Trial of Mercenaries: Luanda, Angola, June, 1976*, 7 MANITOBA L.J. 183, 185 (1977).

³⁹⁶ Universal Declaration, *supra* note 87, art. 10.

³⁹⁷ *Id.* art. 11.

³⁹⁸ *Id.* art. 9.

³⁹⁹ *Id.* art. 8.

⁴⁰⁰ *Id.* art. 5; *see also* Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/1034 (1975); *see, e.g.*, Morocco — Hincker/FIDH, *supra* note 216, at 46-47.

⁴⁰¹ Universal Declaration, *supra* note 87, art. 3.

⁴⁰² *Id.* art. 12.

⁴⁰³ *See, e.g.*, Spain — McGovern/AI (1973), *supra* note 328, at 3.

⁴⁰⁴ Article 14 of the Covenant reads:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . .
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have

the Universal Declaration and further defined in the Covenant still require considerable interpretation in specific cases.

There are two general international standards of fairness which have been the subject of greater elaboration in trial observer reports than any other requirements of the International Bill of Human Rights: the right of a defendant to "all guarantees for his defense,"⁴⁰⁵ and the right to be judged by an "impartial tribunal."⁴⁰⁶ Observers have found numerous violations of the right to a diligent defense.⁴⁰⁷ In many cases, defense counsel have been subjected to interruption and obstruction of their arguments at trial,⁴⁰⁸ intimidation,⁴⁰⁹ theft of defense documents,⁴¹⁰ removal from the case,⁴¹¹ disbarment,⁴¹² banning,⁴¹³ imprisonment,⁴¹⁴ or even extra-judicial

legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
 6. When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
 7. No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Civil and Political Covenant, *supra* note 113.

⁴⁰⁵ Universal Declaration, *supra* note 87, art. 11; *see* Civil and Political Covenant, *supra* note 113, art. 14, para. 3, (b) & (d).

⁴⁰⁶ Universal Declaration, *supra* note 87, art. 10; Civil and Political Covenant, *supra* note 113, art. 14, para. 1.

⁴⁰⁷ To Lord Russell, Captain Dreyfus was not vigorously defended; the attorney appeared docile and was unwilling to make any statements which would offend the military. Dreyfus trial report, *supra* note 11, at 320.

⁴⁰⁸ *See, e.g.*, Tunisia — Ray/AI (1978), *supra* note 388, at 9.

⁴⁰⁹ *See* S. Africa — Gardiner/ICJ (1957), *supra* note 244.

⁴¹⁰ *See, e.g.*, ICJ *Protests Against Police Raid on South African Attorney*, Int'l Comm'n Jur. Press Release (Oct. 20, 1977).

⁴¹¹ A Chilean lawyer who tried to defend his client's loyalty to the Allende government by arguing the constitutionality of the Allende government was barred from further participation in the defense. R. de Schutter & M. Birgin, *Rapport sur la mission de l'Association Internationale des Juristes Democrates au Chile* (14-21 Avril 1974) (unpublished report).

⁴¹² *See, e.g.*, International Commission of Jurists, *Recent Developments in the Pattern of*

killing for defending unpopular clients.⁴¹⁵ Defense counsel may be concerned that the most severe sentences may be reserved for those who fail to adopt a conciliatory tone or who contest both the charges and the law. Nevertheless, observers often find the defense to be "courageous" and "vigorous,"⁴¹⁶ "extraordinarily brave,"⁴¹⁷ quite free to defend the interests of the accused,⁴¹⁸ skilled,⁴¹⁹ and enthusiastic.⁴²⁰

Similarly, observers have been sensitive to questions about the independence and impartiality of the judiciary.⁴²¹ In one instance an observer had to evaluate whether a judge who had previously supervised the prosecution could preside at the trial in keeping with the guarantee of an "impartial tribunal" by the Universal Declaration and the Covenant.⁴²² Questions abound in this type of situation. Does the extent of prosecutorial involvement determine whether the judge was impartial? Does an observer need to find external indicia of unfairness, or does "impartiality" require that judges not sit on cases in which they have served in any prosecutorial capacity?

Trial observers have also commented upon far more blatant violations of impartiality, for example where judges have been arrested for being too conscientious⁴²³ or have been removed from office for

Criminal Justice in Hungary 9, 28-29 (undated) (mimeo) [hereinafter cited as Hungary — Trial of Imre Nagy/ICJ (1958)].

⁴¹³ See, e.g., Arnold, *South Africa — The Sabotage Trial in Pretoria*, 18 BULL. INT'L COMM'N JUR. 37, 42-43 [hereinafter cited as S. Africa — Arnold/ICJ (1963)].

⁴¹⁴ See, e.g., Spain — Aronstein/BLDHR (1972), *supra* note 207, at 10. In Iran two lawyers were imprisoned for having tried to justify their clients' deeds. Iran — Wandschneider/AI (1965), *supra* note 316, at 1. The same problem arose in Portugal. *A Political Trial in Portugal*, 15 BULL. INT'L COMM'N JUR. 50, 51 (1962) [hereinafter cited as Portugal — Rau/ICJ (1962)].

⁴¹⁵ See, e.g., ARGENTINA — N.Y. BAR REPORT, *supra* note 190, at 30, 41-42.

⁴¹⁶ Morocco — Suckow/ICJ (1974), *supra* note 201, at 7.

⁴¹⁷ Indonesia — Dowd/ICJ (1974), *supra* note 209, at 3.

⁴¹⁸ India — Sheppard/ICJ (1976), *supra* note 246, at 25.

⁴¹⁹ Malawi — Kellock/AI (1968), *supra* note 226, at 1.

⁴²⁰ Israel — Mortimer/AI (1975), *supra* note 149, at 6.

⁴²¹ In the Dreyfus case, Lord Russell, the British observer, carefully weighed the impartiality of the judge by considering the judge's respectfulness to all parties at trial, the judge's ability to maintain proper decorum, the judge's willingness to accept all material evidence, the judge's knowledge of the law, and whether the judge properly weighed all of the probative evidence in making a decision. Dreyfus trial report, *supra* note 11, at 322. In assessing the fairness of other proceedings, one observer considered whether the court which tried the defendants had jurisdiction to hear the case, whether the judges were trained lawyers (or military officers), whether the court was genuinely independent of political control, and whether the court was convened specifically for this case or was more permanent. Morocco — Woesner/AI/ICJ (1973), *supra* note 217, at 1.

⁴²² Guyana — Rampersaud, *supra* note 230.

⁴²³ *The Special Court of Dahomey*, 13 BULL. INT'L COMM'N JUR. 15, 19 (1962) [hereinafter cited as Dahomey — Ahomadegbe].

their political views,⁴²⁴ threatened with removal for issuing the "wrong decision,"⁴²⁵ subjected to political directions⁴²⁶ or secret police control,⁴²⁷ and replaced for refusing to pronounce the death sentence.⁴²⁸ The most common impartiality issue arises when the defendant is tried by judges whom the government has specifically selected for the trial.⁴²⁹

Although the broad language of the International Bill of Human Rights leaves considerable room for interpretation, there is remarkably little guidance for observers beyond the language of the documents themselves. The jurisprudence of the Human Rights Committee as to the requirements of Article 14 is beginning to grow as the Committee reviews more reports, but remains quite limited and has not yet been used by trial observers.⁴³⁰ The European Convention on Human Rights contains language very similar to that of the International Bill of Human Rights and has an extensive jurisprudence for observers to consult,⁴³¹ but they rarely do.⁴³²

Ideally, observers should assess the trials they attend under (1) domestic law, (2) relevant human rights treaties, and (3) customary international law. Obviously, different standards may be appropriate in various situations. Nonetheless, this approach is more thorough than that found in observer reports which use only the Universal Declaration, make no reference to legal standards, or adopt the observer's own country as the world standard.

⁴²⁴ Greece — Ellman/ICJ (1968), *supra* note 31, at 38.

⁴²⁵ Greece — Gardiner/AI (1972), *supra* note 279.

⁴²⁶ *ICJ Observer Condemns Political Show Trial in Indonesia*, 5 AM. A. INT'L COMM'N JUR. NEWSLETTER 9 (Jan. 1979) [hereinafter cited as Indonesia — 1978/ICJ]; Guyana — Rammersaud, *supra* note 230, at 26–27; Hungary — Trial of Imre Nagy/ICJ (1958), *supra* note 412, at 27.

⁴²⁷ J. Portelle, Rapport de mission en Iran 2 (Feb. 1972) (unpublished report to the International Federation of Human Rights); *see also Iran*, 8 REV. INT'L COMM'N JUR. 5, 7 (1972).

⁴²⁸ Turkey — Noll/ICJ (1973), *supra* note 163, at 4.

⁴²⁹ Portugal — Rau/ICJ (1962), *supra* note 414, at 52; S. Africa — St. John/ICJ (1959), *supra* note 244; Spain — Ziegler-Muller/FIDH (1974), *supra* note 174, at 5; *The Ceylon Coup d'Etat Trial*, *supra* note 263, at 15 (judiciary proved its independence by dismissing case where panel was handpicked by the government).

⁴³⁰ *See* J. Walkate, The Human Rights Committee: Monitoring the International Covenant on Civil and Political Rights 52–63 (1980) (unpublished memorandum). *See also* Note, *Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 Am. J. Int'l L. 142 (1982).

⁴³¹ *See, e.g.*, notes 93–94 *supra*.

⁴³² Observers have used the European Convention on Human Rights as a standard for Spain, even though Spain had not ratified that treaty. *See, e.g.*, Aronstein, *Acquittement à Madrid*, 127 REVUE SOCIALISME 37, 40, 45 (Feb. 1975). But Spain's aspiration to join the European Community made its violations of the European Convention significant.

C. *The Impact of Observers on Trial Participants*

There are three basic sources of information on the impact of trial observers — psychological experiments, the reactions of local attorneys, and the reports of trial observers themselves.

Experimental psychology has not directly evaluated the way judges, lawyers, and other trial participants react to being observed. The trial process is so complex that it would be difficult to make such evaluations.⁴³³ Nevertheless, psychologists have performed a number of experiments in laboratory conditions which may help determine whether observers have an impact on trials, what sort of impact they have, and how to enhance a favorable impact.

Psychologists have established a number of principles which might shed light on the impact of trial observers. First, people who are observed while performing tasks that they already know tend to perform better than usual.⁴³⁴ Second, people tend to have difficulty learning new tasks when they are being observed.⁴³⁵ Third, if the ob-

⁴³³ See generally G. McCall, *OBSERVING THE LAW: APPLICATIONS OF FIELD METHODS TO THE STUDY OF THE CRIMINAL JUSTICE SYSTEM* (1975); Asch, *Social Pressures and Opinions*, SCIENTIFIC AM., November, 1955, at 5; Wasserman & Robinson, *Extra-legal Influences, Group Processes, and Jury Decision-making: A Psychological Perspective*, 12 N.C. CENT. L.J. 96, 135-41 (1980).

⁴³⁴ A 1925 experiment involved the performance of a well-learned motor task by the subject before a group of spectators. Performance of the task improved in front of the audience. Travis, *The Effect of a Small Audience Upon Eye-Hand Coordination*, 20 J. ABNORMAL SOC. PSYCH. 142, 146 (1925).

⁴³⁵ In a 1933 experiment, subjects took significantly longer to learn a list of nonsense syllables when confronted with an audience as compared to an alone condition. Pessin, *The Comparative Effects of Social and Mechanical Stimulation Upon Memorizing*, 45 AM. J. PSYCH. 263 (1933).

The apparent inconsistency between the first and second findings went unexplained until 1965, when Robert Zajonc, professor of psychology at the University of Michigan, published the seminal article which concluded that well-learned responses were facilitated by the presence of spectators, while the acquisition of new responses was impaired. Zajonc, *Social Facilitation*, 149 SCIENCE 269 (1965). Zajonc explained this discrepancy in terms of the Hull-Spence theory of motivation.

The Hull-Spence theory postulates that certain events or conditions will excite or arouse an organism. K. SPENCE, *BEHAVIOR THEORY AND CONDITIONING* (1956). "Arousal" has particular physiological signs — increased secretion of hormones, for example. Mediating between the "arousal" and the subsequent behavior is a psychological process known as "drive." The more the organism is aroused, the greater is its level of drive. Drive serves to increase dominant responses over subordinate responses. Dominant responses are facilitated because of their "habit strength," that is, they have been repeated more often than subordinate responses.

Zajonc's theory, then, is that the presence of an audience is one of those factors that arouses the organism and increases drive level. The performance of a well-learned task will be improved because the correct responses are dominant. Nickolas Cottrell of Kent State University has further explained that the individual becomes aroused because of previous negative or positive experiences when performing in front of an audience. Cottrell, *Performance in the Presence of Other Human Beings: Mere Presence, Audience and Affiliation Effects*, in *SOCIAL FACILITATION AND IMITATIVE BEHAVIOR* (E. Simmel ed. 1968). The anticipation of a nega-

served person believes the observer to be an expert capable of evaluating his conduct, he will perform better.⁴³⁶ Fourth, the observed person will tend to behave more in conformance with societal norms in the presence of an observer who shares those norms.⁴³⁷ Finally, the

tive or positive experience becomes unconsciously associated with (classically conditioned to) the situation of performing before spectators. In Cottrell's theory, known as the "learned drive view," the ability of the observer to evaluate the past experience of the observed determines the extent of the effect on performance. *Id.* at 104.

Psychologists Shelley Duval and Robert Wicklund suggest the "objective self-awareness" theory for improved performance. S. DUVAL & R. WICKLUND, *A THEORY OF OBJECTIVE SELF-AWARENESS* (1972). The effect of the observer increases the subject's awareness of himself or herself as object. The subject will then take more care to perform to a higher standard in front of an audience. Meanwhile, psychologist Milton Rosenberg of the University of Chicago was taking note of a confounding factor in many psychological experiments: the desire that many subjects displayed to achieve a positive evaluation from the experimenter. Rosenberg, *The Conditions and Consequences of Evaluation Apprehension*, in *ARTIFACT IN BEHAVIOR RESEARCH* (R. Rosenthal ed. 1969). The subject would then try to behave in a way that he thought would demonstrate his own mental health and maturity, rather than in the way he would behave in the absence of the experimenter. Rosenberg called this phenomenon "evaluation apprehension."

⁴³⁶ The learned drive, objective self-awareness, and evaluation apprehension theories are all based on the same notion: that the social facilitation effect will only take place if the subject believes that the observer has the power to evaluate him.

A number of experiments have tested the hypothesis that the presence of another with sufficient knowledge to evaluate the subject's performance will produce a greater social facilitation effect than the presence of another with seemingly insufficient knowledge to evaluate the subject's performance. This hypothesis was confirmed by Henchy and Glass in 1968. Henchy & Glass, *Evaluation Apprehension and the Social Facilitation of Dominant and Subordinate Responses*, 10 J. PERSONALITY & SOC. PSYCH. 446 (1968). On a word recognition task, performance was increased in the condition in which subjects thought they were performing in front of an expert audience. This result was repeated in two later experiments in which motor tasks were performed. Sasfy & Okun, *Form of Evaluation and Audience Expertness as Joint Determinants of Audience Effects*, 10 J. EXPERIMENTAL SOC. PSYCH. 461 (1974).

Other studies have compared the effects of a peer audience to a supervisory audience. Hendricks and Brickman tested the hypothesis that people would enhance their statements of performance expectancies before a higher status audience while becoming more modest before an audience of their peers. Hendricks & Brickman, *Effects of Status and Knowledgeability of Audience on Self Presentation*, 37 SOCIOLOGY 440 (1974). Students displayed greatest self-enhancement to their teacher, less to an uninvolved graduate student, and still less to their peers. See also Baker, *The Effect of Threat of Evaluation on Children's Verbal Learning as a Function of Sex of Subject and Social Condition*, 37(9) DISSERTATION ABSTRACTS INT'L 4749-B (1977); Rittle & Bernard, *Enhancement of Response Rate by the Mere Physical Presence of the Experimenter*, 3 PERSONALITY & SOC. PSYCH. BULL. 127 (1977).

⁴³⁷ In the presence of an observer, teachers behave more like teachers are supposed to behave, as an experiment by Samph demonstrated. Teachers tended to be "more like the perceived ideal" when an observer was present in the classroom. Samph, *Observer Effects on Teacher Verbal Classroom Behavior*, 68 J. EDUC. PSYCH. 736 (1976). Similarly, mothers behave more like mothers are supposed to behave when they are being observed as opposed to when they are not. Zegib, Arnold & Forehand, *An Examination of Observer Effects in Parent-Child Interactions*, 46 CHILD DEV. 509 (1975).

Another experiment involved four subjects, three of whom were confederates of the experimenter. One confederate was selected as the victim. The experimenter ordered the other two confederates and the naive subject to administer shock to the victim. The two confederates rebelled, and in most instances the naive subject rebelled along with them. S. MILGRAM,

observed person will grow accustomed to the observer's presence, causing the observer's effect to diminish over time.⁴³⁸

Although these experimental findings may have limited application to the complex courtroom process,⁴³⁹ some inferences can be drawn. From the first principle one can infer that an observer should improve the fairness of a trial, provided that the participants are accustomed to treating defendants fairly. Since judges and prosecutors may be more repressive in political trials than they would otherwise be, the observer might help correct the balance. The second principle may not apply directly to trial observation, but if anything suggests that judges who are not accustomed to being fair will have difficulty improving their performance when observed. The third and fourth principles strongly suggest that trial observers should be selected for their prestige and appearance of expertise in the eyes of the trial participants. The participants should then tend to conform their conduct to the fairness which the observer expects. Finally, if an observer attends a trial for a long period, her impact may decline.

Other information about the impact of trial observers may be found in the reports of the observers themselves. Obviously, trial observers may exaggerate their impact on trial proceedings. But the author's interviews with over 25 observers and review of more than 100 reports reveal considerable modesty. Frequently, observers relied upon the reactions of local attorneys, including defense counsel, for

OBEDIENCE TO AUTHORITY 116 (1974). The subject conformed to the perceived expectations of the two observers.

The effect of observer presence on the likelihood of the subject to behave in aggressive, anti-social, or altruistic fashion is dependent on a number of factors. The evidence does show, however, that the subject will frequently behave in the way he thinks the observer expects him to behave. *See* B. LATANE & J. DARLEY, *THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP?* 123, 125 (1970); Wilson, *Motivation, Modeling, and Altruism: A Person X Situation Analysis*, 34 J. PERSONALITY & SOC. PSYCH. 1078 (1976).

⁴³⁸ Habituation has been studied primarily in the context of naturalistic observation in the home. White studied the activity level of families under observation and concluded that they habituated to the observer in a relatively short period of time. White, *The Effects of Observer Presence on the Activity Level of Families*, 10 J. APPLIED BEHAVIOR ANALYSIS 734 (1977). Johnson and Bolstad found that families do not adapt to the presence of an audiotape recorder any faster than they do to a human observer. Johnson & Bolstad, *Reactivity to Home Observation: A Comparison of Audio Recorded Behavior with Observers Present or Absent*, 8 J. APPLIED BEHAVIOR ANALYSIS 181 (1975). Finally, some experimenters have noted that the facilitating effect of an audience on behavior such as physical aggression tends to decline over time. *See, e.g.*, Harrell & Schmitt, *Effects of a Minimal Audience on Physical Aggression*, 32 PSYCH. REP. 651 (1973).

⁴³⁹ Most of the reported psychological experiments were conducted with participants and observers who shared a culture and norms. In most cases trial observers also share a legal culture, if not other attributes, with judges and prosecutors. But most observers gain some of their prestige from being foreigners. The reported experiments do not consider this factor. Despite the difficulties, it might be interesting and useful to design experiments which would identify the impact of trial observers on the conduct of judges and prosecutors.

assessing the impact of their presence. The local attorneys can see the difference in the way the proceedings are conducted depending upon whether the observer is present or absent.

Most observers have found their presence to improve procedural fairness, but fewer noted an impact on the actual result of the trial. After commenting on her possible impact upon the trial procedures and sentences, one typical observer reported, "I believe that the judgment of the Bench was not affected one jot by the combined foreign presence."⁴⁴⁰

One observer, however, noted that his presence may have caused the defendant's sentence to be half that demanded by the prosecution — twenty-three rather than forty-two years of imprisonment.⁴⁴¹ In other observed cases, a defendant was acquitted of most of the charges and received a very light sentence;⁴⁴² a death sentence was not imposed⁴⁴³ although initially requested;⁴⁴⁴ relatively light suspended sentences and fines were imposed;⁴⁴⁵ and sentences were reduced from fourteen to twenty years to two to six.⁴⁴⁶

Observers have been told that their presence gave defense counsel greater latitude in presenting the defense;⁴⁴⁷ encouraged the court to pay more attention to the defense arguments;⁴⁴⁸ made the "prosecutor most uncomfortable in his job;"⁴⁴⁹ made the judge allow the defendant's family to attend the trial although admittance had been previously denied;⁴⁵⁰ encouraged the local press to give more critical attention to the trial;⁴⁵¹ made the court's rulings on defense motions more favorable than in earlier unobserved proceedings;⁴⁵² encouraged the court to hear an appeal fully whereas such proceedings had previously averaged only ten minutes;⁴⁵³ lengthened the trial;⁴⁵⁴

⁴⁴⁰ Iran — Assheton/AI (1968), *supra* note 227, at 1.

⁴⁴¹ Spain — Aronstein/BLDHR (1972), *supra* note 207, at 12.

⁴⁴² S. Africa — Velleman/ICJ (1977), *supra* note 212, at 2.

⁴⁴³ South West Africa — Larson/LWF (1968), *supra* note 164, at 1.

⁴⁴⁴ Iran — Assheton/AI (1968), *supra* note 227, at 1.

⁴⁴⁵ *Namibia*, 8 INT'L COMM'N JUR. REV. 12, 13 (1972).

⁴⁴⁶ Spain — Suckow/ICJ (1975), *supra* note 77.

⁴⁴⁷ Israel — Mortimer/AI (1975), *supra* note 218, at 7; S. Africa — Thornberry/AI (1974), *supra* note 226, at 1, 4; Spain — Aronstein/BLDHR (1972), *supra* note 207, at 11. The I.C.J. commented in *The Poznan Trials*, 6 BULL. INT'L COMM'N JUR. 1, 3 (1956): "Encouraged by the presence of foreigners and by the feeling that they had a strong backing in Poland and in the world, counsel for the defence at the trial spoke on behalf of their clients with a freedom and courage not hitherto known in the court proceedings of the Soviet orbit."

⁴⁴⁸ Malawi — Kellock/AI (1968), *supra* note 226, at 1.

⁴⁴⁹ Lesotho — van Niekerk/AI (1974), *supra* note 162.

⁴⁵⁰ Iran — Assheton/AI (1968), *supra* note 227, at 1.

⁴⁵¹ *Id.*

⁴⁵² Guyana — Omawale *et al.*/AI (1980), *supra* note 332, at 17.

⁴⁵³ S. Korea — Sanguinetti/ICJ (1972), *supra* note 170, at 6.

helped the defendant obtain competent defense counsel;⁴⁵⁵ or had no visible effect.⁴⁵⁶

Another measure of the impact of observers is that they are requested to return to observe later proceedings and are appreciated by opposition groups and their lawyers.⁴⁵⁷ But a few observers have expressed concern that their reports or press coverage might have had an adverse impact on the actions of the authorities.⁴⁵⁸ Critical reports might also cause the authorities to hold fewer public trials, detain people without trial or close trials to further scrutiny.⁴⁵⁹ Other observers have felt that the international press had more effect than they.⁴⁶⁰ Additionally, it can be very difficult to separate the impact of trial observers from the publicity their reports receive.⁴⁶¹

On balance, it appears that observers should, and do, in fact have considerable favorable impact on the fairness of the trials they observe.

VI. MODEL GUIDELINES FOR ORGANIZATIONS SENDING INTERNATIONAL TRIAL OBSERVERS

The International Commission of Jurists,⁴⁶² the International Federation of Human Rights,⁴⁶³ and to a limited extent, Amnesty

⁴⁵⁴ Taiwan — Seymour/AI (1975), *supra* note 78, at 13.

⁴⁵⁵ C. Morand, Report on the SASO/BPC Trial, at 4 (Dec. 16, 1975) (unpublished report to the International Commission of Jurists).

⁴⁵⁶ Iran — Blom-Cooper/AI (1965), *supra* note 326, at 3.

⁴⁵⁷ See, e.g., S. Africa — MacDermot/ICJ (1974), *supra* note 180, at 5; S. Africa — Lovatt/ICJ (1978), *supra* note 289, at 5.

⁴⁵⁸ Cf. Dreyfus trial report, *supra* note 11, at 317 (only U.S. and Russia were friends of France; comments in German and English press antagonized the French); Malawi — Kellock/AI (1968), *supra* note 226, at 2 (observer recommended his report not be published because of government obliviousness to criticism).

⁴⁵⁹ C. Bourguet, Rapport de la répression en Iran, 21-28 février 1972, at 2 (Mar. 4, 1972) (unpublished report to the International Association of Democratic Lawyers); E. Martin-Achard, Le procès de Burgos 1 (undated) (unpublished report to the International Commission of Jurists); Spain — Suckow/ICJ (1975), *supra* note 77.

⁴⁶⁰ Indonesia — Dowd/ICJ (1974), *supra* note 209, at 7.

⁴⁶¹ Greece — Ellman/ICJ (1968), *supra* note 31, at 3; Greece — Martin-Achard (1973), *supra* note 375; Aronstein, *supra* note 312, at 41.

⁴⁶² International Commission of Jurists, Guidelines for ICJ observers to Trials (1978) [hereinafter cited as ICJ Guidelines]. Only after nearly twenty years of sending observers did the I.C.J. begin to give its observers specific guidelines. These I.C.J. guidelines are a basic source for the guidelines proposed in this study. The I.C.J. had previously established more general fact-finding guidelines: Int'l Commission of Jurists, Outline for Reports by Persons Travelling on Missions for the International Commission of Jurists, November 1961 (mimeo); Int'l Commission of Jurists, Missions on Behalf of the International Commission of Jurists, January 1963 (mimeo).

⁴⁶³ The International Federation of Human Rights (F.I.D.H.) has publicly issued a "Code de déontologie des observateurs judiciaires de la F.I.D.H." The Code is stated in far more general and less useful terms than the I.C.J. guidelines.

International⁴⁶⁴ have developed rules of conduct for their observers. These organizational rules and the substantial experience of many observers set forth in this study can form the basis of a set of model guidelines for sponsoring organizations. These guidelines should assist both future observers and newly organized sponsoring groups.

These guidelines clearly cannot be imposed arbitrarily upon observers or their sponsors. Each organization or government may have different objectives in sending trial observers. Furthermore, whatever detailed guidelines might be suggested, the basic rule for observers must be to use their best judgment in responding to the situation at hand.

Bearing in mind that strict adherence to inflexible procedures could limit the effectiveness of a trial observer mission, it is possible to distill a few useful lessons from experience. Hence, the following guidelines are suggested:

A. Justification for Observers

International trial observers have been sent by governments and nongovernmental organizations to trials of political or human rights interest at least since the end of the 19th Century, when Queen Victoria sent the Lord Chief Justice of England to the Dreyfus trial. Observers attended significant trials in Nazi Germany during the 1930's and the 1956 Poznan trials in Poland. Given the several hundred trials observed during the past twenty-five years, it is fair to conclude that an international practice of sending and receiving trial observers has developed. The work of trial observers is based on the internationally recognized right to an open trial and does not impermissibly interfere in the domestic affairs of states.

The purposes of an observer mission usually are: (a) to prepare an independent, impartial, and objective report on the fairness of the trial taking into account its legal, economic, and political context; (b) to help assure the defendant a fair trial through the influence of the observer; (c) to give the defense counsel, the defendant, and the defendant's supporters a sense of international concern; and (d) to express the sponsor's concern about the fairness of the proceedings without prejudging whether the trial is fair.

Different trials may require a distinct emphasis among these four principal purposes. Also, the purposes may conflict in some circum-

⁴⁶⁴ Amnesty International, Rules to be Observed by All Persons Charged with Attending Trials or Carrying out other Missions on Behalf of Amnesty International, December 16, 1975 [hereinafter cited as A.I. Rules]. The A.I. Rules are quite brief, specific as to a few items, but not as comprehensive as the I.C.J. Guidelines.

stances. Accordingly, the observer must be free to exercise judgment in conducting the mission as the situation requires.

The observer should conduct himself or herself with dignity, impartiality, independence, and humanitarian concern, keeping in mind the sensitive nature of trials and the objectives of the sponsoring organization.

B. *Selection of Trials*

Trials should be selected for observation in light of the purposes outlined above, as well as the political or human rights significance of the proceedings, the media attention given the trial, the possible role of unjust laws, the political or cultural importance of the defendant, the invitation of the government involved, and the financial resources of the sponsor.

C. *Selection of Trial Observers*

The principal factors to consider in choosing a trial observer include the individual's (a) prestige and reputation for impartiality; (b) knowledge of the legal system in which the trial will occur; (c) knowledge of the language in which the trial will be held; (d) availability on short notice; (e) appropriate nationality and other personal characteristics given the country where the trial will occur; (f) ability to enter the country of trial without a visa; (g) distance from the trial in terms of expense and traveling difficulty; (h) trustworthiness in following directions and familiarity with the sponsoring organization; (i) experience as a trial observer; and (j) knowledge of international human rights standards.

D. *Informing the Host Government*

The sponsoring organization should give the observer several copies of an Order of Mission setting forth the purposes of the mission, the trial to be observed, the identity and qualifications of the observer, and a request for the cooperation of the local authorities. The sponsor should also send a telegram to the Minister of Justice of the country concerned, indicating the identity of the observer and the trial to be observed, and requesting the usual facilities.⁴⁶⁵

E. *Briefing*

Before commencing the trial observation mission, the observer

⁴⁶⁵ The principal source of this section is the I.C.J. Guidelines, *supra* note 462.

should be briefed as to (a) the approach, policies, methods, and international status of the sponsoring organization; (b) the background of the case, with emphasis on the concerns of the sponsor; (c) the specific objects of the assignment; (d) the names, addresses, telephone numbers, and backgrounds of lawyers, translators, and other appropriate contacts; and (e) the means of communication with the sponsor while the mission is in progress.⁴⁶⁶

F. *Translators*

If the observer requires a translator, either she or the sponsor should make the necessary arrangements before or soon after arrival. Because the choice of a translator will substantially affect the independence, impartiality, and impact of the observer, the translator should be selected with as much care as the observer. Ideally, the translator should be familiar with legal terminology, impartial, and immune from government retaliation. The translator should sit next to the observer at trial and give a simultaneous translation *sotto voce*.

G. *Visas and Entry Formalities*

(1) Wherever possible observers are selected who do not require visas to enter the country concerned or are selected from among those who already possess visas. If a visa is required, the observer should in general apply for a visa by submitting a copy of the Order of Mission and stating that the purpose of the visit is to attend the trial in question as an observer for the sponsoring organization.

(2) Observer practice varies greatly as to the amount of information offered authorities regarding the purpose of the observer's mission, and no generalization regarding appropriate disclosure is possible.⁴⁶⁷

H. *Public Statements Before, During, and After the Missions*

(1) In general, neither the observer nor the sponsor should publicly announce the mission unless there is no risk that the observer will be refused entry to the country, or a refusal is anticipated and publicity will enhance the chance that the observer will be admitted.

(2) Since there is a considerable variety of practices concerning public statements by observers during their missions, no general guideline can be proposed which will cover all organizations; rather,

⁴⁶⁶ The principal source of this section is the A.I. Rules, *supra* note 464; see also AI, Rules for Observers and Other Missions (undated draft).

⁴⁶⁷ The principal source of this section is the I.C.J. Guidelines, *supra* note 462.

the observer should carefully follow the rules of the sponsoring organization.

(3) In the absence of guidance from the sponsor, the observer should not make any public statements before the conclusion of the case, except as may be necessary to confirm to the press that he or she is a representative of the sending organization, that he or she is not authorized to make public statements before or during the trial, and that he or she will, upon completion of the mission, submit a report to the organization, to which all inquiries may be directed.⁴⁶⁸

(4) In the absence of instructions to the contrary, if at the end of the trial there is a significant matter which calls for immediate comment, the observer should have discretion to make a statement to the press — preferably after leaving the country. A copy of any such press statement should be transmitted immediately to the sponsoring organization.

I. Travel and Hotel Arrangements

(1) If possible, there should be arrangements for the observer to be met at the airport by a neutral, respected individual who may be able to assist with entry problems, who is not involved in the trial, who can transport the observer to the hotel, and who may provide an initial briefing.

(2) The observer should stay in a hotel which is both moderately prestigious and close to the courthouse. The observer should decline invitations to stay with the defendant's attorneys or supporters.

(3) In arranging air travel, the observer should make reservations with an airline other than the national carrier of the country concerned — particularly for the departure.

J. Contacts, and Interviews After Arrival

(1) The observer should make contact, before trial if possible, with the defense attorney, prosecutor, and judge. The observer should maintain an appearance of impartiality in balancing contacts with the defense and prosecution. The observer should arrange for an impartial and respected attorney (or if not, a defense attorney) to introduce him or her to the judge before proceedings begin. At this initial meeting the observer should exchange the usual courtesies, explain the purpose of the mission if asked, and make arrangements for entry to the courtroom and for seating.⁴⁶⁹

⁴⁶⁸ The principal source of this subsection is the A.I. Rules, *supra* note 464.

⁴⁶⁹ The principal source of this subsection is the I.C.J. Guidelines, *supra* note 462.

(2) Depending upon the sponsor's instructions and the nature of the case, the observer should contact not only individuals who can facilitate matters such as entry into the courtroom, but also the Minister of Justice and other government officials who can provide background information, or who should be contacted as a courtesy. The observer should explain that he or she has been sent by the sponsoring organization to observe the trial and prepare a report, but that he or she does not (absent specific instructions or an official position) represent the organization in a more general capacity.

(3) The observer should attempt to interview the defendant in a location that would permit maximum confidentiality while allowing the observer to ascertain the defendant's mental and physical state and the conditions of confinement.

K. *Seating in the Courtroom, Introductions in Court, and Taking Notes*

The observer should sit in a prominent, neutral location in the courtroom. He or she may arrange to be introduced at the beginning of the court session by an impartial and respected attorney. He or she should be seen taking full notes of the trial.

L. *Timing, Preparation, and Substance of the Observer's Report*

(1) Immediately after departing from the country the observer should begin to prepare a report on the trial. He or she should complete the report as promptly as possible — generally within one month — and send it in confidence to the sponsoring organization.

(2) In preparing the report, the observer should carefully consider his or her instructions, the information collected in and outside the courtroom, the reliability of the information, and the methodology used.

(3) Insofar as time permits, the observer should consider the following outline for the report:

- (a) the observer's instructions;
- (b) the background of the case;
- (c) the facts of the case as revealed at trial and by independent fact-finding, with particular emphasis on the prosecution and defense evidence;
- (d) the charges, applicable laws, pretrial procedures, trial process, judgment (if any), and subsequent proceedings;
- (e) the mental and physical condition of the defendant and the conditions of confinement;
- (f) an evaluation of the fairness of the proceedings, applica-

ble laws, and treatment of the defendant under national and international standards; and

(g) a conclusion.

(4) The report should append such material as:

(a) a copy of the Order of Mission;

(b) copies of relevant procedural rules, court decisions, and laws;

(c) copies of charges, transcripts, and the court's judgment;

(d) a description of the observer's methodology, including materials studied and persons interviewed;

(e) sensitive material which should be omitted from any published report;

(f) copies of newspaper articles referring to the trial or the observer's presence, with the names of the newspapers and dates of publication;

(g) additional information not strictly within the observer's mission (such as information about other prisoners, other trials, and recent laws);

(h) practical observations for the guidance of future observers.

(5) The observer should specify whether and how long certain parts of the report must be kept confidential.⁴⁷⁰

(6) The observer should prepare the report in the language which will be most useful to the sponsoring organization; the organization should specify the desired language.⁴⁷¹

(7) If the official text of the judgment or decision is not available when the observer departs from the country, arrangements should be made to send a final copy to the observer and to the sponsoring organization.⁴⁷²

(8) Absent instructions to the contrary, the observer should report only to the sponsoring organization. The report and all other material acquired by the observer in connection with the mission should be considered the property of the organization for its sole use and disposal.⁴⁷³

(9) If the mission was jointly sponsored, the observer should supply his or her report and related material to each sponsor.⁴⁷⁴

(10) If there is any matter that calls for urgent comment by the

⁴⁷⁰ The principal source of this subsection is the I.C.J. Guidelines, *supra* note 462.

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ The principal source of this subsection is the A.I. Rules, *supra* note 464.

⁴⁷⁴ *Id.*

sponsoring organization, the observer should immediately alert the organization.⁴⁷⁵

(11) In the case of a protracted trial, the observer will usually attend only some of the proceedings. In such cases, the observer should immediately prepare an interim report and then submit a final report when the trial is completed.

M. *Standards to be Used*

The observer should assess the trial under (1) the law of the country concerned, (2) any relevant human rights treaties, and (3) customary international law. The observer should particularly refer to the International Bill of Human Rights for applicable standards.⁴⁷⁶

N. *Financial Arrangements and Sponsorship*

(1) Unless otherwise agreed in writing by the sponsoring organization, the observer should not accept any concurrent mandate, financial assistance, or material support from any other organization or source. The sponsoring organization should be solely responsible for the expenses of the mission.

(2) At the end of the mission, the observer should promptly submit a complete expense report to the sponsoring organization.⁴⁷⁷

These are general guidelines only. Observers should follow them only insofar as they are helpful. Sponsors will necessarily modify these instructions to fulfill their objectives. Ultimately, observers must rely upon their own good judgment.

⁴⁷⁵ The principal source of this subsection is the I.C.J. Guidelines, *supra* note 462.

⁴⁷⁶ See note 393 *supra* and accompanying text.

⁴⁷⁷ The principal source of this section is the A.I. Rules, *supra* note 464.

